

1993

## Commentary: Textualism and Tax Cases

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### Original Citation

Deborah A. Geier, Commentary: Textualism and Tax Cases, 66 Temple Law Review 445 (Summer 1993)

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Citation: 66 Temple L. Rev. 445 1993

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## COMMENTARY: TEXTUALISM AND TAX CASES\*

Deborah A. Geier \*\*

"We do not inquire what the legislature meant; we ask only what the statute means."

—Oliver Wendell Holmes<sup>1</sup>

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\* Though not yet tenured, I bravely submit this Commentary for publication and would be proud to list it on my resume. See Arthur Austin, *Commentary on Jensen's Commentary on Commentary*, 24 CONN. L. REV. 175, 182 (1991) ("[A]nyone going up for tenure with a commentary credit on his resume is in a high-risk category."); Erik M. Jensen, *Law Review Correspondence: Better Read Than Dead?*, 24 CONN. L. REV. 159, 166 n.42 (1991) ("I have heard of deans and faculties who prefer that colleagues write nothing rather than produce short, literate essays. Needless to say, when faculty incentives are skewed in favor of little or no publication, faculty will devote their best nonefforts to that result."). While I do not consider myself "supremely self-confident," see W. Lawrence Church, *Commenting on Commentaries*, 24 CONN. L. REV. 185, 190 (1991) ("[c]ertainly, none but the most supremely self-confident untenured aspirant would now dare to buck the tide against the current [of long, traditional articles] at most law schools"), I do believe in the value of the short essay (notwithstanding this interminable footnote and lengthier-than-originally intended Commentary) and believe that I am lucky enough to have faculty colleagues who agree with me.

Released from any pretensions of grand authority, short essays and articles can generate discourse; they can act as a goad toward further debate. In making their points briefly and directly, they can aspire to engage the interest and response of their readers . . . If they are kept short and readable enough, such offerings might actually be read. Then they could precipitate the sort of dialogue the law reviews exist to promote.

*Id.* at 193.

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1. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). Judge Easterbrook, a textualist soul mate of Justice Scalia, see, e.g., Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983), has quoted this Holmes aphorism approvingly. *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989). Professor Zeppos notes the irony of this in view of the fact that the pragmatic Holmes later wrote that "every question of construction is unique, and an argument that would prevail in one case may be inadequate in another." Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1374 (1990) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 402 (1916)). Justice Holmes's pragmatism in statutory interpretation, recognizing that an approach to any particular statutory case must be shaped by the nature of the statute, the area of law, and the precise issue rather than be guided by any single grand theory of statutory interpretation, accords with my own pragmatism. See *infra* note 3, notes 59-64 and accompanying text, and notes 167-68 and accompanying text.

Cf. Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131, 1144 (1987) ("The most pretentious form of first page differentiation is the 'lead-in' quotation whereby the author prefaces the main body of the text with a quote from an esteemed scholar, a famous decision, or some other prestigious source.").

## I. PROLEGOMENON

More than 100 years ago, a German jurist wrote of a special heaven reserved for theoreticians of the law where one would find, among other things, a "dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any . . . statute . . ."<sup>2</sup> Some modern-day earthlings, called "deconstructionists," seem to believe that we have arrived at this hermeneutic state of affairs without the need of leaving terra firma.<sup>3</sup> Tax lawyers, however,

2. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) (citing VON JHERING, IM JURISTISCHEN BEGRIFFSHIMMEL, IN SCHERZ UND ERNST IN DER JURISPRUDENZ 245 (11th ed. 1912)).

3. See Erik M. Jensen, *A Day in the Life of S. Breckenridge Tushingham*, 69 DENV. U. L. REV. 231, 241 (1992) ("And who's this guy, Herman Newdics, that everyone talks about?").

The academic orthodoxy associated with "hard-core" deconstruction, see *infra* notes 162-68 and accompanying text (distinguishing between hard-core and soft-core deconstruction), cannot be condensed into a short description. In his quite accessible book on deconstruction, David Lehman uses over a hundred pages to set the stage for an ensuing ten-page, ten-point summary of what he believes to be the tenets of orthodox deconstruction. See DAVID LEHMAN, *SIGNS OF THE TIMES: DECONSTRUCTION AND THE FALL OF PAUL DE MAN* 104-13 (1991). One fundamental tenet of the deconstructionist is the indeterminacy of text. "Words can have no single fixed meaning. Like wayward electrons, they can spin away from their initial orbit and enter a wider magnetic field. No one owns them or has a proprietary right to dictate how they will be used." *Id.* at 19. Thus, all text, broadly defined to include history and philosophy, is indeterminate, reduced to irreconcilable binary opposites.

The abstruse movement in legal academia known as "Critical Legal Studies" is the legal branch of literary deconstruction. "The underpinning of Critical Legal Studies is a theory of indeterminacy derived from deconstruction—as if the interpretation of statutes and precedents were somehow an extension of literary criticism rather than a fundamentally different activity, involving different objectives, undertaken in a different spirit." *Id.* at 38. See generally Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815, 820-33 (1990) (briefly describing and critiquing deconstruction and its role in Critical Legal Studies).

Cass R. Sunstein and others have argued that even if text is essentially indeterminate, so that interpreting the text is tantamount to creating its meaning, the exercise of judging is not an exercise of raw power. "To make the unsurprising point that the choice among interpretive strategies or background norms implicates a value judgment is hardly to say that the choice is arbitrary. The existence of judgments of value leads to a conclusion of arbitrariness only for the most incorrigible of positivists." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 442 (1989). Few pragmatists could disagree with that insight. Perhaps the task, then, should be to identify consciously and to agree upon (the latter being the more difficult task) the background interpretive norms that should govern statutory interpretation in those hard cases where reliance on such norms is most explicit. See *id.* at 460-503 (proposing interpretive norms).

On the other hand, perhaps all such efforts to mechanize statutory interpretation are simply wrongheaded. See *infra* notes 59-64 and accompanying text. The eminently sensible approach set forth by William N. Eskridge, Jr. and Philip P. Frickey is irresistibly tantalizing in its "pooh-on-grand-theory" overtones. They argue that just as practitioners consult eclectic sources in interpreting statutes when advising clients—including "the relevant statutory provisions, any legislative history that is available, the context in which the legislation was enacted, the overall legal landscape, and the lessons of common sense and good policy"—so should judges. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1990) (rejecting as inadequate, when viewed alone, what they consider to be three foundational theories of statutory interpretation: intentionalism, purposivism, and textualism). "Judges' approaches to statutory interpretation are generally eclectic, not inspired by any grand theory, and this is a good

are musty old curmudgeons<sup>4</sup> who, for quite practical reasons, need to insist upon a defined and limited range of meanings regarding the words used in the Internal Revenue Code.<sup>5</sup>

The age-old debate over how to determine statutory meaning has gained a remarkable renaissance since Antonin Scalia reached the Supreme Court,<sup>6</sup> occurring just as some legal scholars began seriously to advance those "nihilist theories about the indeterminacy of language."<sup>7</sup> Justice Scalia's method of statutory

methodology." *Id.* at 321-22. Along this line lies Justice Stevens's eloquent elaboration of his "fifth canon of statutory interpretation" that "requires judges to use a little common sense." John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1383 (1992); see also Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 449 (1989) ("Pragmatist interpretation asks, therefore, what are the consequences of the alternative readings of the statutory provision in question? Which one is, all things considered—notably including all things that lawyers are sensitized by their craft to consider pertinent—the best?"). Cf. Gwen T. Handelman, *Zen and the Art of Statutory Construction: A Tax Lawyer's Account of Enlightenment*, 40 DEPAUL L. REV. 611 (1991) (discussing the tax lawyer's private lawmaking in advising clients regarding positions to take on tax returns).

4. *But see* Erik M. Jensen, *The Heroic Nature of Tax Lawyers*, 140 U. PA. L. REV. 367 (1991) (recounting the brave and daring exploits of the tax lawyer in John Grisham's bestseller, *THE FIRM* (1991)).

5. Though they insist that statutes have meaning, and only a limited range of meanings at that, I do not personally know any tax lawyers who are fascists.

A sympathetic and highly intelligent doctoral candidate told me in all earnestness that "meaning is fascist." . . . We inhabit, he said, an indeterminate universe. Everything is mediated entirely through language—the only way we can know anything is by using words. And the words of any discourse constantly shift their meaning. Everything depends on interpretation, and no interpretation is more correct than any other. The proper attitude is to regard all interpretations as equally "not true and not false." To insist that a given piece of discourse means something specific and decided is to elevate one meaning at the expense of the others. It is to uphold a hierarchy of values, and that renders one guilty of a dictatorial urge. Fascism, in short.

LEHMAN, *supra* note 3, at 58. Cf. Jensen, *supra* note 4 (discussing the [nonfascist] heroic nature of tax lawyers).

I confess to confusion in pondering that a *failure* to subscribe to deconstruction leads to fascism when the *apotheosis* of deconstruction—the Newspeak in George Orwell's 1984—was Big Brother's most potent apparatus.

George Orwell's 1984 is the canonical text on the dangers of the denial of objective reality [which accompanies deconstruction]. The state's triumph over the recalcitrant individual is sealed when a broken Winston Smith is persuaded that his torturer's four raised fingers number five. What makes such mental manipulation possible is the state's control of language. We can hardly be expected to applaud the disjunction between words and what they refer to, if that is the condition that empowers a totalitarian state—such as the one Orwell describes—to falsify the past and alter the terms of our existence by eliminating some words and redefining others. Discourse, lacking a center, becomes an instrument of power, and so, in the land of Big Brother, war is peace, freedom is slavery, and ignorance is strength.

LEHMAN, *supra* note 3, at 99.

6. See generally Symposium, *The Jurisprudence of Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991) (containing 16 pieces commenting on various aspects of Justice Scalia's jurisprudence).

7. P. John Kozyris, *In the Cauldron of Jurisprudence: The View From Within the Stew*, 41 J. LEGAL EDUC. 421, 428 (1991).

interpretation—which has been referred to as “the new textualism”<sup>8</sup> but which I believe is more accurately expressed as “literalism”—is best described as the virtual antithesis of deconstruction. According to Justice Scalia, texts are absolutely determinate.<sup>9</sup> Moreover, the single legitimate means of arriving at that determinate meaning is through a sterile parsing of the statutory text’s words.<sup>10</sup> The “ordinary meaning”<sup>11</sup> and “natural reading”<sup>12</sup> of words as they are “commonly understood”<sup>13</sup> both begin and end the exegesis of the texts we call statutes. (His application of these tenets also insists upon correct “Proper English” with respect to both grammar and style,<sup>14</sup> a dialect that unfortunately is neither “ordinary,” “natural,” nor “commonly” used these days).<sup>15</sup>

Textualism officially scorns the use of interpretive tools other than Black’s

8. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *New Textualism*] (describing and critiquing in detail the development of Justice Scalia’s brand of textualism); see also Rob Bennett, *The Supreme Court and ‘Textualism’*, 49 TAX NOTES 109 (1990); Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663 (1991); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597 (1991) (each similarly referring to Justice Scalia’s method of statutory interpretation as “textualism”).

9. But see William T. Mayton, *Law Among the Pleonasm: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 157 (1992) (concluding that textualism assumes indeterminacy).

10. The rise of textualism in the Supreme Court was already in motion before Justice Scalia joined the Court. See Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982) (detecting trend toward relying on literal words of statute). Justice Scalia, however, has surely solidified textualism as no one before.

11. See, e.g., *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2632 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning.”); *American Nat’l Red Cross v. S.G.*, 112 S. Ct. 2465, 2481 (1992) (Scalia, J., dissenting) (“Even if it were the case that my reading of the clause rendered [a later amendment] superfluous, I would consider that a small price to pay for adhering to the competing (and more important) canon that statutory language should be construed in accordance with its ordinary meaning.”); *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) (“[T]he key phrase, obviously, is ‘relating to.’ The ordinary meaning of these words is a broad one—to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with . . .—and the words thus express a broad pre-emptive purpose.”); *INS v. Elias-Zacarias*, 112 S. Ct. 812, 816 (1992) (“The ordinary meaning of the phrase ‘persecution on account of . . . political opinion’ in § 101(a)(42) is persecution on account of the victim’s political opinion, not the persecutor’s.”).

12. See, e.g., *American Nat’l Red Cross*, 112 S. Ct. at 2478 (Scalia, J., dissenting) (“I therefore conclude—indeed, I do not think it seriously contestable—that the natural reading of the ‘sue and be sued’ clause . . . confers upon the Red Cross only the capacity to ‘sue and be sued’ in state and federal courts . . .”). *Morales*, 112 S. Ct. at 2038 n.2 (“Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning.”).

13. *Wisconsin Dep’t of Revenue v. Wrigley Co.*, 112 S. Ct. 2447, 2453 (1992) (“[s]olicitation,’ commonly understood, means ‘[a]sking’ for, or ‘enticing’ to, something”).

14. William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1142-48 (1992) [hereinafter Popkin, *Internal Critique*].

15. See Erik M. Jensen, *To Whom It May Concern*, CLEV. PLAIN DEALER, Aug. 2, 1991, at 5C; Erik M. Jensen, *Is It a Crime to Murder the Queen’s English?*, CLEV. PLAIN DEALER, July 10,

law dictionary (and occasionally Webster's),<sup>16</sup> the surrounding statutory language,<sup>17</sup> and the entire United States Code<sup>18</sup> in deciphering the meaning of words at issue and the resulting effects of a statute. Because Justice Scalia narrowly looks to the dictionary and other statutes, he often disagrees with the assertion that there exists an ambiguity in the first place in need of judicial resolution; he finds clarity where others find an ambiguity in need of solution.<sup>19</sup> Indeed, although one commentator has stated that "no one in his right mind would advocate . . . completely mechanizing the interpretation and application of the law to remove the human factor in judging,"<sup>20</sup> Justice Scalia seems to come as close to that state of affairs as possible with respect to statutory interpretation.<sup>21</sup> Development of statutory meaning through case-by-case adjudication—cognizant of what Professor Sunstein calls the "background norms" that inevitably affect statutory interpretation,<sup>22</sup> through what Professor Popkin calls the "common-law" or "collaborative" approach to statutory interpretation<sup>23</sup> and by what Professor Eskridge calls the "dynamic approach"<sup>24</sup>—is improper,

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1987, at 5B; any of William Safire's *On Language* columns in the weekly NEW YORK TIMES SUNDAY MAGAZINE.

16. In the 1991-1992 term, Justice Scalia cited Black's Law Dictionary (6th ed. 1990) in *Wisconsin Dep't of Revenue*, 112 S. Ct. at 2453; *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2166 (1992); *United States v. Burke*, 112 S. Ct. 1867, 1872 (1992) (Scalia, J., concurring in the judgment); *Dewsnup v. Timm*, 112 S. Ct. 773, 784 (1992) (Scalia, J., dissenting). He used Black's Law Dictionary (5th ed. 1979) in *Morales*, 112 S. Ct. at 2037. He cited Webster's Third New International Dictionary (1981) in *Wisconsin Dep't of Revenue*, 112 S. Ct. at 2453 and cited Webster's New International Dictionary (2d ed. 1950) in *Burke*, 112 S. Ct. at 1875.

17. See, e.g., *Dewsnup*, 112 S. Ct. at 779 (Scalia, J., dissenting); *Burke*, 112 S. Ct. at 1874 (Scalia, J., concurring).

18. See Popkin, *Internal Critique*, *supra* note 14, at 1148-52 (describing Justice Scalia's use of entire United States Code as grand "Super-Text" to be construed consistently with statute at issue).

19. [The majority] merely describes (uncritically) "the contrasting positions of the respective parties and their amici" concerning the meaning of § 506(d) . . . and concludes, because the positions are contrasting, that there is "ambiguity in the text," . . . (This mode of analysis makes every litigated statute ambiguous.) Having thus established "ambiguity," the Court is able to summon down its *deus ex machina*: "the pre-Code rule that liens pass through bankruptcy unaffected"—which cannot be eliminated by an ambiguous provision, at least where the "legislative history" does not mention its demise.

*Dewsnup*, 112 S. Ct. at 786 (Scalia, J., dissenting). Justice Scalia conceded that the Court has consulted pre-Code treatment in resolving "genuinely ambiguous provisions" but disagreed that the text was "genuinely ambiguous." *Id.* at 786. See *infra* notes 92-94 and accompanying text (citing cases in which Justice Scalia found no ambiguity under the first step in a *Chevron* analysis and thus refused to defer to an agency construction of the statute).

20. Kozyris, *supra* note 7, at 429.

21. Some believe this description overstates the case. See Sunstein, *supra* note 3, at 430 n.92 ("Justice Scalia has, notably, endorsed some canons of construction.").

22. *Id.* at 412.

23. See Popkin, *Internal Critique*, *supra* note 14, at 1133-38 (contrasting Justice Scalia's textualism with Justice Stevens's common-law approach); see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Note, *supra* note 10, at 912-15 (both touting common-law model of statutory interpretation).

24. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation*].

in Justice Scalia's view, as contrary to the "rule of law."<sup>25</sup>

External context is ignored except in the case in which the "ordinary meaning" of a word produces an absurd or "unthinkable" result.<sup>26</sup> In such a case, Justice Scalia will consider context but only to confirm that there is no positive evidence that Congress intended the absurd result reached using the "ordinary meaning."<sup>27</sup> Justice Scalia's refusal to consider external context in other cases results in an interpretive process that differs fundamentally from that of the hundreds of other judges who have invoked the so-called "plain-meaning rule" over the decades.

The interpretive process [for most judges] is almost certainly, as Judge Posner suggests, one of moving back and forth between words and other indicia of meaning without preconceived notions about whether the words are clear. When courts rely on plain meaning, they are stating a conclusion reached after the interpretive process is complete, not specifying a stopping point in the judicial process.<sup>28</sup>

For Justice Scalia, reliance on plain meaning does, indeed, represent a "stopping point in the judicial process" ninety-nine percent of the time. He would disagree with the statement that "[e]xternal context always threatens to unsettle the plain meaning of the statutory language,"<sup>29</sup> for he would not consider the external context in the first place.

While Justice Scalia invokes the Hart and Sacks notion that the judge's role is to divine the animating purpose behind a statute and interpret the statute to further it,<sup>30</sup> he does not invoke it (as others do) in order to consult extra-statutory sources of information. Rather, he believes that "the ordinary meaning of [the statutory] language *accurately expresses the legislative purpose*."<sup>31</sup> Justice Scalia particularly eschews references to the "original intent"<sup>32</sup> of the enacting

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25. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

26. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

27. *Id.*

28. William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543, 594-95 (1988) (footnote omitted) [hereinafter Popkin, *Collaborative Model*].

29. *Id.* at 598.

30. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 166 (tentative ed. 1958) (discussing policy as foundation of statutory construction); Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 823 (1991) (describing very briefly the Hart and Sacks Legal Process approach and subsequent theories of political economy, including the current rage, public-choice theory); William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 367 (discussing the authoritative, purpose, and truth values of legislative history within the context of various critique frameworks); Popkin, *Collaborative Model*, *supra* note 28, at 552-71 (describing "legislative will" as result of "private interest," "private compromise," or "public deliberation," with latter returning to notions of "broader community interests" and purpose inherent in Legal Process approach); Sunstein, *supra* note 3, at 446-51 (describing public-choice theory and "deals").

31. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2633 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992) (emphasis added)).

32. Though Professor Eskridge criticizes some of the excesses of Justice Scalia's textualism, he applauds what he sees as textualism's rejection of intentionalism or originalism. "Significantly, the



new textualism also frees formalism from the mortmain of archaeology and invites dynamic statutory interpretation, a move that Justice Scalia's approach shares with most of the anti-formalist theories of the 1980s." Eskridge, *New Textualism*, *supra* note 8, at 667. Thus, Professor Eskridge believes that Justice Scalia advocates dynamic interpretation of broadly intransitive statutes, such as the Sherman Antitrust Act, and even of transitive statutes that have been amended since original enactment. *See id.* at 667-68; *infra* note 51 (discussing intransitive and transitive statutes); *see also* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 24 (describing Professor Eskridge's theory of dynamic statutory interpretation in more detail). *But see* Steven D. Smith, *Correspondence: Law Without Mind*, 88 MICH. L. REV. 104, 105 (1989) ("present-oriented interpretation is deeply flawed").

Justice Scalia's perceived rejection of originalism is consistent with his related view that agencies ought to be able to interpret ambiguous statutory words according to contemporary understanding. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518 ("capacity of the *Chevron* approach to accept changes in agency interpretation *ungrudgingly* seems to me one of the strongest indications that the *Chevron* approach is correct" [emphasis in original]). It is, however, inconsistent with statements he made in a speech given around the country that statutes ought to be construed as of the time of enactment. *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 454-55 (1988) (quoting from speech given by Justice Scalia).

The supposed rejection of originalism could also be seen as inconsistent with his majority opinion from the 1991-1992 term in *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683 (1992). The issue in the case was whether fee-patented land owned by Indians on Indian reservations could be subjected to property tax (and thus foreclosed upon for nonpayment) by the state of Washington. *Id.* at 685. In the *absence of express congressional authorization*, states' taxing jurisdiction with respect to Indians on Indian reservations is essentially nonexistent. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). *See also* *Montana v. Blackfoot Tribe*, 471 U.S. 759 (1985) (striking down state severance tax on Indian royalties); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (striking down state cigarette tax on sales to Indians); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (upholding state tax on Indian activity outside reservation); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (striking down state income tax on Indian wages earned on reservation). This reflects the current federal policy favoring tribal sovereignty and self-determination which has been extant since 1968. The states' power to tax is considered preempted by federal interests—here, the maintenance of the land mass within the reservation. If the case had arisen on a slate free of congressional legislation, the state of Washington would have lost under the Court's own precedents regarding the state's taxing power with respect to Indian interests on Indian reservations.

However, the slate was not clean. The broad congressional statute enacted in 1887, known as the Dawes Act, sought to eliminate both the tribal way of life of Indian tribes and Indian reservations themselves by allotting individual plots of land to Indians, acculturating them to be yeoman farmers, and eventually (25 years later) issuing them individual fee patents for the allotments. In 1905, the Supreme Court construed the Dawes Act to allow state taxation of allotted lands immediately upon allotment. A 1906 statute, the Burke Act, was enacted to ensure that allotted lands were *not* taxed until they were released from trust ownership by the United States, *i.e.*, until a fee patent was issued to the Indian. At the same time, the Burke Act also allowed for expedited issuance of fee patents prior to the expiration of the original 25-year period. Assimilation was still the clear federal policy when the Burke Act passed. The expectation was that by the time a fee patent was issued, Indians would be assimilated into the mainstream culture, tribalism and tribal sovereignty would be dead, and the Indian reservations would be remembered as only a footnote in history, a temporary holding tank on the way to the ultimate resolution of the "Indian problem."

The allotment program failed miserably and resulted in a pendulum swing in federal Indian policy in the opposite direction with enactment of the Indian New Deal, the Indian Reorganization Act of 1934. It halted the further allotment of Indian land, halted the issuance of fee patents for

those plots already allotted (*i.e.*, ownership remained in the United States in trust for the allottee-beneficiary, thus preventing sale of the allotment without the consent of the government), provided mechanisms to reacquire if possible land that had escaped Indian ownership in order to rebuild the tribal land base, and set up a mechanism for tribes to adopt self-governance on Indian reservations. The purpose (if not actual then one that should be normatively ascribed to it—with all due respect to those authors who deny that there can be an articulated “purpose” to an enactment) was to promote tribal sovereignty and to stop the disintegration of the Indian land mass, which had decreased from 138 million acres prior to the allotment program to 48 million acres.

This was not the sole policy shift in Indian policy; the pendulum swings regularly back and forth. See DAVID H. GETCHES & CHARLES F. WILKINSON, *FEDERAL INDIAN LAW* 33-160 (2d ed. 1986) (broadly describing these historical shifts in federal Indian policy). In the 1950s, with tribalism seen to be too much like communism to be comfortable, the federal policy turned once again to assimilation—to “termination and relocation.” The special trust relationship between the federal government and several tribes was terminated, and Indians of other tribes were offered grants to relocate from reservations to certain urban centers. The next pendulum swing came with the Nixon administration and its policy of “self-determination.” That policy remains current federal policy toward Indians.

While the allotment program was abandoned under the 1934 Act, the Dawes Act and Burke Act were never formally repealed. Dicta in a 1976 Supreme Court opinion agreed that the mass of subsequent legislation repealed the Dawes Act by implication, but Justice Scalia would not recognize the dicta under the maxim that “repeals by implication are not favored.” *Yakima*, 112 S. Ct. at 690 (quoting the non-Indian law case of *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). He also believed that the Burke Act, which had not been the subject of such troublesome dicta, supplied independent jurisdiction to tax in any event. *Id.* at 691. In addition to refusing to recognize the implied repeal of the Dawes and Burke Acts due to the massive change in federal policy, Justice Scalia considered it important that the 1934 Act did not disturb *titles* to already fee-patented lands and did not return to indivisible tribal ownership the lands allotted to individuals even though it froze them in trust indefinitely. *Id.* He also refused to consider the possibility that it would not be inconsistent for fee-patented lands to be nontaxable so long as owned by Indians on Indian reservations while, at the same time, to become taxable once sold to a non-Indian (much the same as non-Indians on Indian reservations may be taxed by the state regarding other matters even though Indians may not be so taxed under the cases cited *supra*). *Id.* Finally, Justice Scalia asserted that the Yakima Nation’s “policy objections do not belong in this forum. If the Yakima Nation believes that the objectives of the Indian Reorganization Act are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress.” *Id.* at 692.

In short, Justice Scalia looked at the words of the text in isolation and a general canon of construction in upholding Washington’s right to tax, and thus to foreclose upon and take ownership of, lands owned on the reservation by Indians who had been issued fee patents prior to the termination of the issuance of patents in favor of continued trust ownership by the federal government. The Indian Law canon of statutory construction that statutes are to be construed favorably for the Indians based on the special trust relationship between the federal government and the tribes, see *Blackfeet Tribe of Indians*, 471 U.S. at 766, was no help for the Indians who were losing their land in this case. The checkerboarding of ownership on the reservation was thus exacerbated even though tribal economic development and wise use of the reservation land mass are important components of current federal Indian policy. Most clearly, an originalist and textualist approach controlled. Justice Blackmun wrote a heartfelt, but lone, dissent. *Yakima*, 112 S. Ct. at 694 (Blackmun, J., concurring in part and dissenting in part).

The general canons of construction, though often maligned, are defensible if one thinks of them as shorthand expressions of larger judicial values that should be observed in deciding cases. The judicial value expressed in the general canon of construction that implied repeals of statutes are disfavored is a sound one. Courts *should* be loath to conclude lightly that Congress, by a later act, impliedly repealed an earlier act for reasons grounded in the separation of powers if nothing else. But should that canon control in situations in which the value sought to be protected is so clearly not implicated? Would the Court really have been stepping on Congress’s toes here if it had concluded

Congress (as reflected in legislative history)<sup>33</sup> as well as general policy argu-

that the tax provision, passed by an assimilationist Congress, is so out of step with the huge, vast quantity of legislation passed since then evidencing a desire to protect Indian land from state taxation and state encroachment as well as to protect the Indian land mass that Congress should be considered as impliedly overruling it?

Even more ironic is the majority's conclusion regarding the validity of a second tax at issue in this case: a state excise tax on the sales of Indian fee-patented land. Scalia ruled that tax invalid because it was not a tax on land but on the sale, and *only taxes on Indian lands are authorized under the Dawes and Burke Acts*. *Id.* at 693-94. The more intrusive tax—the tax on the Indian land itself—was upheld, while the less intrusive tax—the tax on the act of selling the land—was struck down as invalid, as an impermissible intrusion on Indian self-government and self-determination. It makes no sense.

33. Justice Scalia is best known—in the comparatively prosaic world of statutory interpretation, that is—for his extreme aversion to legislative history. While a judge on the United States Court of Appeals for the District of Columbia Circuit, Scalia wrote an opinion derisively reprinting a colloquy on the floor between Senators Armstrong and Dole in which Senator Armstrong asked Senator Dole, then-Chairman of the Finance Committee, whether he had read the Committee Report. Senator Dole responded, "I am working on it. It's not a bestseller, but I am working on it." *Hirschey v. Federal Regulatory Energy Comm'n*, 777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985). *See* Farber & Frickey, *supra* note 32, at 439-42 (discussing the colloquy in greater detail to challenge the implication left by Justice Scalia in his selective quotation). His most often-cited polemic on legislative history is that found in *Blanchard v. Bergeron*, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring in part and concurring in the judgment) (attacking lower court's use of Senate committee report). He did not let up in the 1991-1992 term. *See, e.g., United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2111 (1992) (Scalia, J., concurring in the judgment) ("I do not find its explanations persuasive, particularly that with respect to silencer[s], which resorts to that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history."); *Morales*, 112 S. Ct. at 2038 n.2 ("The dissent believes petitioner's position on this point to be supported by the history and structure of the ADA (sources it deems "more illuminating" than a "narrow focus" on the ADA's language . . . ) . . .").

Armed with its warrant of textual ambiguity, the plurality conducts a search of § 5037's legislative history to determine whether that clarifies the statute. . . . After all, "[a] statute is a statute," . . . and no matter how "authoritative" the history may be—even if it is that veritable Rosetta Stone of legislative archaeology, a crystal clear Committee Report—one can never be sure that the legislators who voted for the text of the bill were aware of it. The only thing that was authoritatively adopted *for sure* was the text of the enactment; the rest is *necessarily* speculation.

*United States v. R.L.C.*, 112 S. Ct. 1329, 1339-40 (1992) (Scalia, J., concurring in part and concurring in the judgment).

I join the opinion of the Court, including Parts II and III, which respond persuasively to legislative-history and policy arguments made by respondent. It is regrettable that we have a legal culture in which such arguments have to be addressed (and are indeed credited by a Court of Appeals) . . . . [T]he plain text of the statute should have made this litigation unnecessary and unmaintainable.

*Union Bank v. Wolas*, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring).

Contrary to respondent's suggestion, legislative history has no bearing on the ambiguity point. As in the Eleventh Amendment context, . . . the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.

*United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992). Justice Stevens's dissent, which Justice Blackmun joined, chastises the Court for "refusing to consider [the] legislative history" of the provision at issue. *Id.* at 1017-18 (Stevens, J., dissenting). "The legislative history unambiguously

ments, viewing them both as illegitimate tools in statutory interpretation.<sup>34</sup> His

demonstrates that Congress intended the statute to be read literally. . . . The congressional purpose to waive sovereign immunity is pellucidly clear." *Id.* at 1018.

Judge Breyer of the United States Court of Appeals for the First Circuit and Judge Wald of the United States Court of Appeals for the District of Columbia Circuit have separately written from the trenches a thoughtful defense of appropriate uses of legislative history, which considers the arguments against all such use, the practicalities of deciding cases, and the practicalities of the workings of members of Congress, their staff, and groups that are affected by proposed legislation. Like most critiques that go too far, there resonates a kernel of truth in Justice Scalia's indictment of legislative history and judges who show an *unthinking*, reflexive reliance on each bit of minutia rather than sift all the evidence, including legislative history in those cases where it is helpful and appropriate, through the sieve of judicial reasoning. But the reaction to that kernel of truth should not be to throw the baby out with the bathwater. (I offer all due apologies for the overabundance of metaphor.) "The 'problem' of legislative history is its 'abuse,' not its 'use.' Care, not drastic change, is all that is warranted." Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 874 (1992).

Can judges not be trusted to give less weight to an isolated remark of a disgruntled legislator in a floor debate than to the words in the text itself?

The textualists may be doing a disservice to the courts and ultimately to the public by perpetuating the myth that our statutory construction tasks can be disposed of mechanistically in most cases and that the sheer logical force of a statute's language or internal structure can dictate our hard choices of interpretation.

Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 302 (1990). Professors Farber and Frickey similarly conclude that Justice Scalia's cynicism regarding legislative history is excessive even when the inquiry proceeds under the cynical public-choice political theory thought to actuate Justice Scalia's views. Farber & Frickey, *supra* note 32, at 437-61.

There is a somewhat distinct but related point to be made regarding the use of legislative history, and that point pertains to the constraints of statutory drafting. Statutes cannot be written in expository prose, in free-form paragraphs that tell the reader all it would like to know. Many of those who decry the use of legislative history argue that Congress should memorialize in clear language what it intends to do in statutory language and not rely on legislative history to make law. While that is all well and good, it ignores the fact that much legislative history does not attempt to make law or fill in gaps but rather tries to give a fuller description in much more readable paragraph form of what must be written in self-executory language. When Congress writes a law exacting a fine for certain conduct, for example, the statute simply *cannot* explain anything beyond the cold, hard fact that the conduct will result in a fine. Only the legislative history can clue a reader in to how and why Congress exercised its power to make law, answers that may help a judge understand the law and apply it effectively if a question arises regarding its applicability in a certain fact situation. In that situation, "a crystal clear Committee Report," *R.L.C.*, 112 S. Ct. at 1340 (Scalia, J., concurring in part and concurring in the judgment), does not create the law and is not cited by the judge as the source of the law but rather helps the judge understand the law that was in fact created by Congress through the statutory language, drafted in its necessarily constrained form.

34. Though he referred to the "motivating policies" of a statute as an "obscure phrase" in one case during the 1991-1992 term, *R.L.C.*, 112 S. Ct. at 1339 (Scalia, J., concurring in part and concurring in the judgment), even Justice Scalia resorted to citing both a snippet of legislative history and a snippet of policy during the term in construing statutes. In *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2481 n.4 (1992), Justice Scalia cited a Senator's statement regarding a provision's purpose made during hearings considering the provision. In construing the exemption found in the Freedom of Information Act for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," Justice Scalia noted that his interpretation "is in accord with the general policy of FOIA . . . that the particular purposes for which a request is made are irrelevant." *United States Dep't of State v. Ray*, 112 S. Ct. 541, 550 (1991) (Scalia, J., concurring in part and concurring in the judgment).

view that such excursions beyond the statutory language entail illegitimate judicial lawlessness<sup>35</sup> continued unabated in the 1991-1992 term: "[T]he phenomenon calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of 'a government of laws, not of men.'"<sup>36</sup>

Any discussion of judicial statutory interpretation in the modern-day administrative state must consider the landmark decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>37</sup> a decision for which Justice Scalia has voiced support both in the academic literature<sup>38</sup> and in his opinions.<sup>39</sup> In *Chevron*, the Supreme Court set forth a two-part test to apply when considering the construction of a statute by an agency charged with its interpretation.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative determination. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>40</sup>

The agency's answer is "permissible" so long as it is a "reasonable" construction of the statute, not necessarily the single, correct construction.<sup>41</sup>

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35. Textualism subscribes to the notion of the court as an "honest agent" of the legislature. Frank H. Easterbrook, *The Supreme Court, 1983 Term—Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984). Under this conception, "[b]ackground norms, policy considerations, indeed all 'outside sources,' are immaterial. The judicial task is to discern and apply a judgment made by others, most notably the legislature. . . . The agency view is usually defended by a claim of judicial legitimacy." Sunstein, *supra* note 3, at 415. Professor Sunstein demonstrates that agency theory and its formalist or literalist approach to construction is neither constitutionally compelled nor will lead to "the best or most sensible system of law." *Id.* at 438; see also Popkin, *Internal Critique*, *supra* note 14, at 1161-86; Zeppos, *supra* note 1, at 1300-35 (both critically analyzing claims that Justice Scalia's textualism is either constitutionally compelled or prudent). But see Mayton, *supra* note 9, at 133-34 (denying that Justice Scalia's textualism subscribes to agency theory).

36. *Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992) (Scalia, J., concurring). Cf. *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2487 (1991) (Scalia, J., concurring in the judgment) (ours is "a Government of laws not of committee reports").

37. 467 U.S. 837 (1984).

38. See Scalia, *supra* note 32.

39. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in judgment).

40. *Chevron*, 467 U.S. at 842-43 (footnotes omitted).

41. *Id.* at 843. "Of course it remains true that under *Chevron*, the agency will prevail even if the court would have chosen otherwise had it been entrusted with the power to decide the issue in the first instance." Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2093 (1990).

Like Scalia's textualism itself,<sup>42</sup> the *Chevron* decision has been glorified and vilified, justified and critiqued on vastly different grounds. Supporters and detractors have argued about whether Congress either explicitly or implicitly directs courts (through the creation of ambiguity combined with the delegation of rule-making power to an agency) to defer, whether the separation of powers requires deference because of the accountability of the political branches, and whether deference is merely a prudential, self-imposed limitation on the courts based upon institutional competencies.<sup>43</sup>

Others have already done a remarkable and exhaustive job of placing both textualism and *Chevron* within an historical and theoretical framework and of critiquing both their strengths and weaknesses as schools of thought. I do not intend, therefore, to restate and reconsider broadly those arguments here.

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42. Just a sampling of the articles published in recent years dealing with statutory interpretation include the articles cited *supra* note 8, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Look at Regents v. Bakke*, 16 SETON HALL LEGIS. J. 57 (1992); Breyer, *supra* note 33; William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Eskridge, *Dynamic Statutory Interpretation*, *supra* note 24; Eskridge & Frickey, *supra* note 3; Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Farber & Frickey, *supra* note 32; John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992); Mayton, *supra* note 9; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992); Popkin, *Internal Critique*, *supra* note 14; Posner, *supra* note 3 (including a bibliographical appendix of works from Aristotle to the present); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Peter L. Strauss, *When the Judge is not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1992); Sunstein, *supra* note 3; Wald, *supra* note 33; Zeppos, *supra* note 1; Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

43. See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 457 n.21 (1989) (collecting and discussing various supporters and detractors of *Chevron* deference); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 187 n.4 (1992) (comparing commentators who favor *Chevron*'s message of deference with those troubled by it).

Professor Strauss has wondered whether deference is merely one of the tools (as is textualism itself) used by the Supreme Court to manage its limited docket. He considers whether textualism and *Chevron* are attempts to mechanize the process of statutory interpretation sufficiently to produce substantial geographic uniformity among the thirteen circuit courts without Supreme Court review. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). Professor Strauss's theory has perhaps been borne out by the significant decrease in the caseload of the Supreme Court since he wrote the article in 1987, including in part cases challenging the validity of an agency action. Under *Chevron*, most such disputes may now be resolved more uniformly by the lower courts, resulting in few conflicts among the circuits and fewer such agency cases reaching the Supreme Court. See Linda Greenhouse, *Court Says Accountants Can Solicit to Get Clients*, N.Y. TIMES, April 27, 1993, at A7 ("While the Court was deciding some 150 cases each term a decade ago, it now appears that the current term will produce, at most, 97 decisions.").

Rather, this Commentary has the much more modest task of examining the consequences of Justice Scalia's brand of textualism combined with his application of *Chevron* in a particular context: adjudication under the Internal Revenue Code. Part II considers Justice Scalia's combination of textualism and *Chevron* in general terms by examining a tax case decided by the high court in the 1991-1992 term: *United States v. Burke*.<sup>44</sup> Using that background, the Commentary then explores textualism, *Chevron*, and tax litigation in Parts III and IV through two illustrative cases: one historical and one hypothetical.

The Commentary seeks to develop three points. First, I question the accepted wisdom that Justice Scalia is in fact an enthusiastic supporter of *Chevron* deference to agencies.<sup>45</sup> I also question the complementary notion that textualism combined with *Chevron* necessarily will result in "a dramatic increase in the executive's power to make law"<sup>46</sup> at the expense of the legislative and judicial branches. It may in some cases lead only to an aggrandizement of the judicial power and a frustration of both the executive and legislative powers.

The view that Justice Scalia will defer to agency interpretations underrates the strength and vehemence with which Justice Scalia subscribes to textualism as an end in itself, as constituting the art of judging (whether the "judge" sits on the bench or in an administrative agency) in the statutory case. Justice Scalia does not appear to select the substantive result he wishes and then proceed to interpret the text to support it. His dogma of textualism subsumes desired—or undesired—results.<sup>47</sup> As Professor Popkin has shown, Scalia's method of determining when it is appropriate to defer to an agency determination is itself based

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44. 112 S. Ct. 1867 (1992).

45. See Sunstein, *supra* note 3, at 448 n.151 (referring to "Justice Scalia's enthusiastic resort to the principle in favor of judicial deference to agency interpretation of law"); Farina, *supra* note 43, at 455 ("appointment of Justice Scalia added an even more determined proponent of *Chevron* and the deferential model"); *id.* at 460 n.42 (referring to "Justice Scalia's extreme solicitude for *Chevron*").

46. Sunstein, *supra* note 3, at 430 n.91. Others agree with Sunstein's observation. "[T]he executive branch's influence in administration of tax laws would be enhanced if Congress' [sic] ability to spell out applications in committee reports were minimized." Bennett, *supra* note 8, at 110. "In disregarding or minimizing legislative intent, judges disregard a branch of Government now controlled by Democrats. The effect, in practice, is often to enhance the power of officials in the executive branch, giving these officials more leeway to interpret laws as they see fit." Robert Pear, *With Rights Act Comes Fight to Clarify Congress's Intent*, N.Y. TIMES, Nov. 18, 1991, at A1. "Combining the enhancement of Presidential authority suggested by decisions like *Chevron* with the alteration in congressional politics likely to result from a devaluation of legislative history works a significant shift in power to the President." Peter L. Strauss, *Comment: Legal Process and Judges in the Real World*, 12 CARDOZO L. REV. 1653, 1656 (1991). "[P]art of the textualist agenda is enhanced executive power at the expense of the other branches—particularly the judicial branch." Zeppos, *supra* note 1, at 1334 (citing confluence of Justice Scalia's textualism with his constitutional arguments in *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting) in favor of greater presidential power).

47. See Popkin, *Internal Critique*, *supra* note 14, at 1138-39 (noting "strong signs that Justice Scalia's perspective is not narrowly focused on substantive results" but rather on his theory of statutory interpretation). Others have noted that *Chevron* deference coupled with nonoriginalist textualism allows the courts room to sanction economic deregulation, a political position with which Scalia is deemed to agree. Note, *supra* note 10, at 910-11; Sunstein, *supra* note 41, at 2074 n.9 & 2084 n.67.

on textualism, and it will not always lead to deferral to the agency.<sup>48</sup>

One might argue that while Justice Scalia's rhetoric of deference to text and deference to administrative agencies evokes a humble, subservient role for the judiciary,<sup>49</sup> the reality is that his brand of textualism arrogates to the judiciary a power<sup>50</sup> to frustrate legislative and administrative frameworks, a power to dictate the terms on which legislation must be drafted—terms that seem untenable today. If his style of statutory adjudication ever gains a solid, unyielding majority on the Court, Congress must adopt one of two courses in order to avoid frustration of its perceived statutory scheme: return to an unrealistic, pre-New Deal style of drafting highly transitive statutes or, alternatively, draft *extremely* intransitive statutes with quite broad delegations of authority to an administrative agency.<sup>51</sup> The first sacrifices the flexibility that the administrative state em-

48. Popkin, *Internal Critique*, *supra* note 14, at 1155-59.

49. "Justice Scalia's textualism boasts a well-polished patina of respect for Congress." Herz, *supra* note 8, at 1677. See *supra* note 35 (describing "agency" theory of textualism).

50. Cf. Herz, *supra* note 8, at 1683 (referring to combination of textualism and *Chevron* as token of "false piety toward legislative supremacy").

51. Professor Rubin effectively describes transitivity as follows:

[T]here is an enormous variation in the extent to which the legislature specifies the effects on private parties that it wants the implementation mechanism to produce. This variation may be described as the statute's degree of transitivity—the extent to which the statutory directive, as articulated by the legislature, is intended to pass through the primary implementation mechanism and apply to its ultimate target. If the statute states the precise rule that the legislature expects the mechanism to apply, it is highly transitive. In contrast, if the statute simply instructs the mechanism to develop rules, it is entirely intransitive: until the mechanism acts, the ultimate target of the statute cannot know what behavior the statute will require.

Statutes can be intransitive with respect to either their application or their elaboration. A statute whose application is intransitive does not state any rule that the agency is expected to apply directly to the target; it merely instructs the agency to develop rules. The Community Reinvestment Act of 1977, for example, states the general policy that banks should extend credit to communities from which they obtain deposits. It then instructs various banking agencies to develop regulations to implement this policy. Since the Act imposes no requirements at all upon the banks until the agency does so, it is totally intransitive.

A statute that is transitive with respect to applicability states at least some rules that the agency is instructed to apply directly to its ultimate target. But such statutes exhibit varying degrees of transitivity regarding the manner in which these rules are elaborated. If the rule is stated very broadly, the statute will continue to be intransitive, despite its direct applicability. The Federal Trade Commission Act, for example, prohibits "unfair or deceptive" trade practices. This is designed to impose some direct rules on private parties, but it does not convey a very clear message about the content of those rules. The content must be elaborated by the agency, through adjudication, rule making, announcements, and advice.

...

From the perspective of the implementation mechanism, the statute's degree of transitivity is the mechanism's degree of discretion. A highly transitive statute gives the mechanism relatively little discretion, whereas an intransitive one gives it a great deal.

Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 381-83 (1989) (footnotes omitted).

Though transitivity is not absolute but rather is a point on a continuum, Professor Rubin gener-



bodies and was created to establish.<sup>52</sup> The second sacrifices some modicum of control through statutory drafting (which will always be seen as limiting to a textualist court), thereby forcing Congress to rely solely on its informal controls of agency action to get the results it envisioned under the legislation.<sup>53</sup>

The second point of this Commentary centers on an aspect unique to tax law. Textualism has far-reaching consequences in the tax arena in particular—perhaps as in no other arena—because of the fact that what is sought to be taxed under the Internal Revenue Code is a theoretical construct larger than any individual policy choice or individual section of the Code. The unthinking use of textualism can lead to wrong results in those tax cases that implicate the *structural* framework and integrity of the income tax. “Structural” issues are those involving the fundamental definition of the tax base; they are those that implicate the very notion of “income” under an income tax.<sup>54</sup> In a very real sense, the theoretical construct we call “income” emerges as the end result of the entire

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alizes that courts enforce transitive statutes whereas agencies enforce intransitive statutes. *Id.* at 384-85. In commenting on Professor Rubin's piece, Professor Strauss gives a very helpful comparison between pre-New Deal transitive legislation and modern intransitive legislation dealing with the same topic: the development and deployment of transportation safety technology. See Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 428-30 (1989) (describing and comparing Federal Railway Safety Appliances Act of 1893 with National Traffic and Motor Vehicle Act of 1966).

In connection with the Internal Revenue Code, one can easily argue that “interpretive” regulations issued under the authority of I.R.C. § 7805(a), see *infra* notes 66-68 and accompanying text, relate essentially to transitive statutes because the basic rule is set forth in the statutory language itself and directly applies to taxpayers, whether or not regulations are issued. “Legislative” regulations, on the other hand, relate to totally intransitive statutes because until a regulation is issued, there are no rules directly applying to taxpayers.

52. “Those who resent legislation's current role tend to look back to the halcyon days before regulation and redistribution, when the legislature generally limited itself to drafting statutes that courts could enforce.” Rubin, *supra* note 51, at 395. Congress would be forced to enact evermore lengthy statutes in an attempt to contemplate and address every factual situation that might arise. Its institutional competence to do so in the modern era is poor: Such detail is the very stuff currently in committee reports that Professor Livingston has argued is better left to Treasury regulations. See Livingston, *supra* note 30, at 833-34. “Justice Scalia . . . in counseling narrow readings of statutes, would require the legislature to enact statutes with a level of detail and specificity (and foresight) that threatens to impair its authority to formulate legislation on the wide variety of issues confronting the modern administrative state.” Ferejohn & Weingast, *supra* note 42, at 572.

53. See Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1319 (1992) (describing informal controls); Strauss, *supra* note 46, at 1657 (“Congress is reduced to using contemporary oversight controls—real politics but not legislative politics.”).

54. “Income” under the widely cited economic definition of income—the Haig-Simons definition—means, in general terms, personal consumption and savings. See WILLIAM D. POPKIN, INTRODUCTION TO FEDERAL INCOME TAXATION 117-18 (1987). At its core, the Internal Revenue Code adopts this definition. It does so by including all “accessions to wealth” over which the taxpayer has “complete dominion,” *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955), in gross income and then allowing deductions for nonpersonal expenses incurred to produce that gross income. What is left at the end of the process is, essentially, what is spent on personal consumption and what is saved and not spent at all. The two structural deviations from the economic definition of income implicit in the Internal Revenue Code are (1) gain or loss in the value of property is not taken into account until “realized” through a disposition of the property and (2) the “imputed in-

collection of sections contained in the Internal Revenue Code.<sup>55</sup> That construct includes the notion that the same dollars should never be taxed to the same taxpayer more than once or deducted by the same taxpayer more than once.<sup>56</sup> Although that rule is not found in any section of the Internal Revenue Code, it is a necessary constraint on what is sought to be taxed as "income" under the aggregate of the sections comprising the Internal Revenue Code. The underlying definition of "income" provides a structure within which interpretation must occur, for it is "income" that we seek to reach under the Internal Revenue Code. That definition thus provides a constraining force affecting how broadly or narrowly terms in the statute should be construed.

That is, quite common words, *seemingly* transitive words, must sometimes take on uncommon meanings in a particular context in order to comply with the *structural* constraints of the income tax that are implicit in the Internal Revenue Code. Courts have historically played a strong role in developing and protecting the overarching structure of tax law through, when required, uniquely nonliteral interpretation.<sup>57</sup> The discussion in connection with the *Philadelphia Park*<sup>58</sup> case attempts to explain why that nonliteral interpretation is justifiable in such cases.

Justice Scalia's brand of textualism can strip both the courts *and* the Treasury Department of the authority to interpret common words (often the best that Congress could have chosen in the circumstances) in uncommon fashion in order to accord with the larger theoretical construct we call "income." The end result may be a poorly administered and adjudicated statute that sacrifices sound theory on the altar of literalism, for it is both unrealistic and undesirable to hope that Congress will step in and correct such unthinking results in individual cases through the enactment of legislation. The enactment of legislation was intentionally made cumbersome by the Framers; it is not an appropriate vehicle through which to adjudicate cases. (And adjudication of cases through legislation is precisely what frustration of the larger statutory scheme through abdica-

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come" from owner-occupied housing and from services performed for oneself does not enter the tax base.

The Internal Revenue Code is, of course, riddled with provisions that have nothing to do with furthering this core definition of "income," such as the deductions for medical expenses, I.R.C. § 213, and personal casualty losses. I.R.C. § 165(c)(3) & (h). Adjudication of issues falling outside the "structural" framework of the income tax may well be resolved adequately using textualist techniques. See *infra* note 147 (further describing structural issues).

55. I like to think of the myriad decisions implementing the overarching structural constraints of the Internal Revenue Code as analogous to the decisions implementing the structural constraints of the Constitution (*i.e.*, the separation of powers and federalism). The source of the analysis often lies not in the interpretation of a single clause of the Constitution (or a single section of the Internal Revenue Code) but rather in the structural constraints implicit in the overall structure of the Constitution (or Internal Revenue Code).

56. See *infra* note 116 and accompanying text.

57. See Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623 (1986) (reviewing tax cases in which Court has used nonliteral interpretation to further coherent development of tax law). Professor Zelenak's article was written prior to Justice Scalia's elevation to the Supreme Court.

58. See *infra* notes 108-23 and accompanying text.

tion of the judicial function in the guise of textualism can require Congress to do.)

Third, I want in this Commentary to suggest the possibility that perhaps the concerted efforts to come up with a handy dandy, one-size-fits-all approach to statutory text are foolhardy, perhaps even wrongheaded. For all my derogatory language above, I do believe that Justice Scalia's brand of textualism has its rightful place, as do both originalism, with its reliance on original congressional intent as evidenced by persuasive legislative history, and dynamic or evolutive statutory interpretation, which discounts legislative history and the milieu of the enacting Congress.<sup>59</sup> There are cases in which I believe their use led to the right result, not because of the result itself but because of the context of the particular issue and case. Might not the "single school" proponents fail to appreciate the vastly different contexts in which ambiguity arises and must be resolved? And might they not over-simplify the intellectual process a judge brings to bear in resolving a case before it?

A single judge might justifiably use different approaches in different cases. Perhaps *structural* constraints implicit in the notion of taxable "income," for example, might justify nonliteral interpretation of text in the particular instance before the court, as considered in this Commentary. If, on the other hand, a significant, fundamental *policy* choice is involved, perhaps it is defensible to adhere to textualism and require Congress to state explicitly in statutory language the policy choice it wishes to make rather than rely on bits of evidence in legislative history.<sup>60</sup> Perhaps statutory issues arising in areas of law that are particularly prone to wide swings in fundamental policy over time are particularly amenable to a rejection of both originalism and textualism in favor of dynamic statutory interpretation.<sup>61</sup> Thus, courts and agencies could further the current federal policy without hamstringing the current litigants with disused and discredited policy choices.<sup>62</sup> And perhaps originalism, with an eye to whatever

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59. See Eskridge, *Dynamic Statutory Interpretation*, *supra* note 24, at 1497 (dynamic statutory interpretation considers "the ongoing, not just original, history of the statute").

60. For example, Wilkinson & Volkman argue that judges should demand explicit statutory language indicating that Congress intended to abrogate an Indian treaty by a later enactment that conflicts with it because the policy choice to abrogate an Indian treaty is so very significant. See Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601 (1975). A snippet of legislative history should not be pounced upon by judges as evidence that Congress intended the later enactment thereby to abrogate treaty rights. *Id.* at 655-59. See *infra* note 167 (quoting from article).

61. While Professor Eskridge believes that textualism is consonant with dynamic statutory interpretation in that both eschew originalism, see *supra* note 32, I believe those open to the possibilities of dynamic statutory interpretation are much more likely to be willing to consider the nontextual context (such as current policy) than are strict textualists. See *supra* note 32 (discussing *Yakima Tribe* tax case).

62. Virtually every area of law contains shifts in policy and includes statutes enacted in one era and interpreted in another era. However, Indian law, because of its huge pendulum swings in policy between the extremes of promoting tribalism and self-determination on the one hand and destroying tribalism in favor of assimilation on the other, see *supra* note 32, exemplifies like no other field of law how a court's interpretation of statutory language might discount the originalist understanding of

evidence of legislative history is found to be persuasive, is defensible in the large group of remaining cases: in those cases in which no significant swings in fundamental policy have occurred since enactment, where no fundamental policy choice is implicated, and where evidence of what members of Congress considered at the time of enactment might be helpful to resolve the ambiguity.

Where Justice Scalia's approach may be wrongheaded, perhaps, is in its asserted universality, its application even in contexts to which it is not well suited. Perhaps the real task of the wise judge is to decide *which* of these approaches is appropriate in deciding a particular case if, in fact, the different approaches would lead to different results.<sup>63</sup> What makes us uncomfortable with the notion that there may be more than one "proper" way to approach a statutory issue is the apparent standardlessness, the apparent discretion it vests in judges to reach a particular end result. The choice among these approaches when a choice must be made may not be standardless, though. The judge is not given unlicensed discretion if the choice is itself tethered to the nature of the issue involved and the historical development of the particular area of law. "Theory" need not be abandoned. Rather, *which* "theory" should govern the case should be informed by context.<sup>64</sup> Perhaps we ought to begin thinking about and debating the possibility that a judge's use of different approaches in different contexts might itself be defensible.

## II. TAX REGULATIONS, JUSTICE SCALIA, AND *CHEVRON*

The fact that Congress enacts a fairly transitive statute, but then delegates to an agency the authority to interpret those words in the first instance, seems to undermine Justice Scalia's premise that at least transitive statutes have an immediate meaning once one looks to the dictionary, surrounding statutory words, and other statutes.<sup>65</sup> Congress has done just that in connection with the Internal Revenue Code. In I.R.C. section 7805(a), Congress has directed that the Treasury Department "shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." This authority is a general one imposed on top of the intransitive statutory mandates to develop rules in specific instances.

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the enacting Congress in order to further the current policy. "[C]ourts 'are not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'" *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976) (quoting *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977)).

63. In many cases, a single result is dictated by several of the approaches; it is only in those cases in which different answers would be dictated under the different approaches that the issue of the "proper" approach to statutory language arises.

64. See Catharine Pierce Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323 (1992) (discussing false dichotomy between realism and formalism and pragmatic, if implicit, blend of both theory or "structured" analysis and contextual analysis in judge's decision-making).

65. See *supra* note 51 (describing transitive and intransitive statutes).

Regulations issued solely under the authority of I.R.C. section 7805(a) are often referred to as "interpretive" regulations and make up the vast majority of Treasury regulations. Such regulations can be thought of as an interpretation of a fairly transitive section of the Code.<sup>66</sup> Less often (although more frequently in recent years, it seems), Congress delegates to the Treasury Department the authority not merely to interpret rules drafted by Congress but to draft the operative rules themselves, *i.e.*, to implement an intransitive statute. The regulations thus issued are often referred to as "substantive" or "legislative" regulations. For example, Congress had a devil of a time coming up with statutory rules governing the filing of a single, consolidated tax return by a group of affiliated corporations. Congress finally resolved the problem by enacting I.R.C. section 1502, which states:

The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability.

The resulting Treasury regulations<sup>67</sup> consist of hundreds of pages promulgating a system that "conform[s] the applicable income tax law of the Code to the special, myriad problems resulting from the filing of consolidated income tax returns . . . ."<sup>68</sup>

*Pre-Chevron* courts, at least in their rhetoric, ostensibly applied a greater level of deference to legislative tax regulations than to interpretive tax regulations issued under the authority of I.R.C. section 7805(a). The First Circuit stated: "To sustain such a challenge to regulations promulgated under 'legisla-

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66. The regulation at issue in *Burke* regarding the meaning of the term "personal injuries", *see infra* notes 76-105 and accompanying text, is an example of an interpretive regulation of a transitive section of the Internal Revenue Code. The Treasury Department issues nearly all of its interpretive regulations in proposed form for public comment before issuing them in final form, even though the Administrative Procedure Act provides an exception to the notice-and-comment rules for "interpretive regulations." *See* 5 U.S.C. § 553(b)(A) and (d)(2) (1988).

67. *See* Treas. Reg. §§ 1.1502-1 to 1.1502-100.

68. *American Standard, Inc. v. United States*, 602 F.2d 256, 261 (Ct. Cl. 1979) (one of very few cases invalidating a consolidated return regulation as outside power delegated to Treasury Department because it imposed a tax on income that would not be taxed outside consolidated group).

Similarly, Congress could not decide on the definitive criteria by which to differentiate debt from equity for purposes of the Internal Revenue Code. It thus enacted I.R.C. § 385(a), which provides: "The Secretary is authorized to prescribe such regulations as may be necessary or appropriate to determine whether an interest in a corporation is to be treated for purposes of this title as stock or indebtedness (or as in part stock and in part indebtedness)." Subsection (b) lists several factors that the regulations "may include" in making that determination. The Treasury Department twice issued and twice withdrew proposed regulations under I.R.C. § 385 and has all but thrown up its hands at further attempts. Practitioners are thus left with judicial decisions and various rulings made by the Internal Revenue Service for guidance in advising their clients. *See also* I.R.C. §§ 337(d), 338(i), 367(b), 382(m), 384(f), 453A(e), 469(l), 864(e)(7), 865(j) (each delegating substantive rule-making authority to the Treasury Department in specific contexts).

tive' authority to implement a statutory scheme is to carry a burden of 'greater weight' than that required to overcome a routine interpretive regulation."<sup>69</sup> The Supreme Court, prior to *Chevron*, similarly held that in reviewing the validity of a legislative regulation the Court's "primary inquiry is whether the interpretation or method is within the delegation of authority."<sup>70</sup> This standard contrasts with the lesser, though still considerably deferential, ones enunciated by the Supreme Court in reviewing interpretive regulations issued under I.R.C. section 7805(a) prior to *Chevron*, i.e., whether the regulation accords with the statutory language that it interprets, whether it is in harmony with the statute's origin and purpose, or whether it is unreasonable and plainly inconsistent with the statute.<sup>71</sup>

Though *Chevron* seems to abandon the varying levels of scrutiny depending on the regulation's status as interpretive or legislative,<sup>72</sup> it might not have actually worked a change in practice in tax. The reality before *Chevron* was that very few Treasury Regulations—whether interpretive or legislative—had been held invalid, notwithstanding the ostensibly different levels of scrutiny.<sup>73</sup> As described below, Justice Scalia's approach to *Chevron*, however, does seem to resurrect this distinction in the sense that if Congress writes specifically, that is, by writing a transitive statute, he will apply the tenets of textualism to define the single correct meaning of the words. That meaning may very well result in invalidation of the agency interpretation. There seems to be room for deference to agency interpretation in Justice Scalia's jurisprudence only in the case of legislative regulations implementing broadly intransitive statutes.<sup>74</sup>

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69. *Merchants Nat'l Bank v. United States*, 583 F.2d 19, 22 (1st Cir. 1978).

70. *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981).

71. See, e.g., *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 25-26 (1982); *Rowan*, 452 U.S. at 252-53; *Commissioner v. Portland Cement Co.*, 450 U.S. 156, 169 (1981); *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979); *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

72. See Farina, *supra* note 43, at 471 n.79 ("*Chevron's* articulation of the deferential model appears to be indifferent to the 'legislative'/'interpretive' rule construct."). But see Herz, *supra* note 43, at 190 (arguing that *Chevron* does not require acceptance of interpretive regulations but does require acceptance of agency lawmaking through legislative regulations). Cf. Rubin, *supra* note 51, at 383 (arguing that "statute's degree of transitivity is the mechanism's degree of discretion").

73. *American Standard, Inc. v. United States*, 602 F.2d 256 (Ct. Cl. 1979), was so newsworthy in the tax world, see *supra* note 68, because it did result in the invalidation of a legislative regulation.

74. Professor Herz concludes that this result is in fact the correct reading of *Chevron* and the right result. The validity of interpretive regulations pertaining to a transitive statute will most often be resolved under *Chevron's* step one. If the regulation accords with the detailed statute, it will be upheld. If not, it will not be, for it is the judge's duty to say what the law is when Congress provides sufficient detail. Step two of the *Chevron* analysis is never broached except in the case of legislative regulations interpreting a broadly intransitive statute. See Herz, *supra* note 43. It is ironic to note, however, that the conclusion that Justice Scalia's combination of textualism and *Chevron* resurrects in practice the differing levels of deference depending on the transitivity of the statute (i.e., depending on the status of the regulation as more purely "legislative" or "interpretive") is contrary to his own words that such a distinction did not survive *Chevron*. "In an era when our treatment of agency positions is governed by *Chevron*, the 'legislative rules vs. other action' dichotomy . . . is an anachronism." *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1236 (1991) (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia has not been a frequent author of tax opinions.<sup>75</sup> Yet, in the 1991-1992 term he penned a separate concurrence in a tax case that forcefully demonstrates both his textualist methodology and the application of that methodology under *Chevron* in the tax arena. The issue in *United States v. Burke*<sup>76</sup> was whether an award of back wages was received "on account of personal injuries or sickness" within the meaning of section 104(a)(2) of the Internal Revenue Code and thus could be excluded from gross income.<sup>77</sup> The plaintiffs were women employed by the Tennessee Valley Authority who filed a class-action suit under Title VII of the Civil Rights Act of 1964, alleging sex-based discrimination in pay schedules. The Authority settled the suit by establishing a \$5 million fund from which the payments at issue were made. The Sixth Circuit held that the amounts received were excludable under I.R.C. section 104(a)(2), but the Supreme Court, in an opinion written by Justice Blackmun, reversed.<sup>78</sup>

The regulation pertaining to section 104(a)(2) defines an amount received on account of personal injuries as "an amount received . . . through prosecution of a legal suit or action based upon tort or tort-type rights."<sup>79</sup> The Courts of Appeals and Tax Court never disputed the validity of the regulation but did disagree among themselves over whether an award of back wages alone could ever constitute an award for personal injuries. Such disagreements arose not only in sex-discrimination cases but in other actions as well, including actions for race and age discrimination and violation of First-Amendment rights.

Under the origin-of-the-claim approach common in tax law,<sup>80</sup> most courts had concluded by the time *Burke* was decided by the high court that the focus in such cases must concentrate on the nature of the injury, not on the derivative consequences (including loss of otherwise taxable wages or business profits) of that injury, in determining whether the "suit or action [was] based upon tort or tort-type rights." Under that view, defamation (not only of personal reputation but of business reputation as well), discrimination on the basis of sex, race, and age, as well as violations of civil rights that resulted in awards were all consid-

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75. But see *Commissioner v. Bollinger*, 485 U.S. 340 (1988); *Commissioner v. Fink*, 483 U.S. 89 (1987) (Scalia, J., concurring). In recent years, the most frequent authors of tax opinions are Justice Blackmun and, until his retirement, Justice Marshall.

76. 112 S. Ct. 1867 (1992).

77. *Id.* at 1868.

78. *Burke v. United States*, 929 F.2d 119 (6th Cir. 1991), *rev'd*, 112 S. Ct. 1867 (1992).

79. Treas. Reg. § 1.104-1(c).

80. The origin-of-the-claim test is the nominal test that has controlled not only inquiries regarding excludability under I.R.C. § 104(a)(2) but also inquiries regarding whether the nexus between an expense and either a trade or business or other income-producing activity is close enough to justify deduction of the expense under I.R.C. § 162 or § 212 or whether the expense is a nondeductible personal one under I.R.C. § 262. See *United States v. Gilmore*, 372 U.S. 39 (1963) (ruling legal expenses incurred during divorce nondeductible even though result of litigation might have required disposition of income-producing assets). It also governs the similar inquiry into whether the nexus between an expense and medical treatment is close enough to justify deduction of the expense under I.R.C. § 213 or whether the expense is a nondeductible personal one. See *Ochs v. Commissioner*, 195 F.2d 692 (2d Cir.) (ruling children's education expenses nondeductible even though incurred on doctor's suggestion in connection with mother's illness), *cert. denied*, 344 U.S. 827 (1952).

ered to be injuries to the dignity of a person, a breach of a duty imposed by law, independent of contract, sounding in tort.<sup>81</sup> This was, in fact, the approach taken by the Sixth Circuit in ruling that the award in *Burke* was excludable.<sup>82</sup> The Fourth Circuit had adopted a different approach to I.R.C. section 104(a)(2). That court did not disagree that the origin of the claim controlled, but it was swayed in similar cases by the nature of the award as back wages—what would otherwise have been taxable if received in the ordinary course—and concluded that such actions sounded more in contract than tort. The Fourth Circuit therefore concluded that such awards should not be excludable.<sup>83</sup>

While agreeing with the Fourth Circuit that such awards should not be excluded, Justice Blackmun's majority opinion in *Burke* took a new approach by concentrating on the *scope* of the limited remedial relief available under the stat-

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81. See, e.g., *Redfield v. Ins. Co. of N. Am.*, 940 F.2d 542 (1991) (age discrimination); *Pistillo v. Commissioner*, 912 F.2d 145 (6th Cir. 1990) (age discrimination); *Rickel v. Commissioner*, 900 F.2d 655 (3d Cir. 1990) (age discrimination); *Byrne v. Commissioner*, 883 F.2d 211 (3d Cir. 1989) (retaliatory discharge for reporting to EEOC); *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989); *Bent v. Commissioner*, 835 F.2d 67 (3d Cir. 1987) (violation of free-speech rights); *Roemer v. Commissioner*, 716 F.2d 693 (9th Cir. 1983) (defamation of business reputation); *Stocks v. Commissioner*, 98 T.C. 1 (1992) (race discrimination); *Downey v. Commissioner*, 97 T.C. 150 (1991) (en banc) (age discrimination); *Metzger v. Commissioner*, 88 T.C. 834 (1987) (sex and national-origin discrimination); *Threlkeld v. Commissioner*, 87 T.C. 1294 (1986) (en banc), *aff'd*, 848 F.2d 81 (6th Cir. 1988) (defamation of business reputation). The *Threlkeld* case was heard en banc because the Tax Court abandoned its prior practice of looking to what the damage award replaced in determining whether the award was made on account of "personal injuries" in the case of nonphysical injuries and instead adopted the origin-of-the claim test. The *Downey* case was heard en banc because it reversed the Tax Court's prior position in *Rickle v. Commissioner*, 92 T.C. 510 (1989), *aff'd in part, rev'd in part*, 900 F.2d 655 (1990), and *Pistillo v. Commissioner*, T.C.M. 1989-329, that back wages in discrimination cases evidence an award originating more in contract than in tort under the origin-of-the claim test.

82. *Burke*, 929 F.2d at 1121-24. It was also the approach maintained by Justices O'Connor and Thomas in their dissent, which similarly concluded that the award in *Burke* should be excludable. See *Burke*, 112 S. Ct. at 1849-80 (O'Connor, J., dissenting).

83. See *Thompson v. Commissioner*, 866 F.2d 709 (4th Cir. 1989) (award of back wages under Title VII and the Equal Pay Act held taxable). In her *Burke* dissent, Justice O'Connor, citing the often-cited case of *Threlkeld v. Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988), reminded the majority that the largest component of an award in the case of physical injury resulting in a traditional tort suit (*i.e.*, the prototypical "personal injury") might also be back and future wages which would have been taxable absent the injury. See 112 S. Ct. at 1880 (O'Connor, J., dissenting). Yet, such an award is excludable under the authority of § 104(a)(2) without question. Thus, the inquiry regarding whether the amounts would have been taxable if received in the ordinary course absent an injury is not helpful. See also *infra* note 93 (describing difficulty in articulating justification for exclusion which makes analysis of its meaning difficult).

The United States Court of Appeals for the District of Columbia had taken a tack completely different from all these other courts: It concluded that an action under Title VII originated in equity, not in law, and that therefore there were no "damages" received within the meaning of § 104(a)(2) because "damages" was a term of art pertaining only to actions at law. *Sparrow v. Commissioner*, 949 F.2d 434 (D.C. Cir. 1991). Justice O'Connor mentioned and disagreed with this approach in her dissent. "The IRS defines 'damages' to include a 'legal suit or action based upon tort or tort type rights.'" 26 CFR § 1.104-1(c) (1991) (emphasis added). This inclusive definition renders the historical incidents of 'actions at law' and 'suits in equity' irrelevant to the proper interpretation of § 104(a)(2)." *Burke*, 112 S. Ct. at 1881 (O'Connor, J., dissenting).



ute at the time of the action: an award of back wages and appropriate injunctive relief. "Nothing in this remedial scheme purports to recompense a Title VII plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages (e.g., a ruined credit rating)."<sup>84</sup> Positing that "one of the hallmarks of traditional tort liability is *the availability of a broad range of damages* to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights,'" <sup>85</sup> the majority concluded that the limited remedial focus of Title VII claims removed them from the realm of claims based on tort-like personal injury.<sup>86</sup> Thus, in determining whether the action sounded more in contract than in tort, the Court took a different approach from the Fourth Circuit. Rather than look to see whether the amount recovered would have been taxable in the ordinary course absent the action, the court instead looked to the *breadth* of relief available under the statute and held that it must be sufficiently broad in scope, as is the scope of relief in common-law torts, for the action to be based upon a "tort-type" right within the meaning of the regulation.

The validity of the regulation's approach was not argued in either the lower courts or the Supreme Court. Each court accepted the guidance offered by the regulation, which was promulgated in 1960; they disagreed only with respect to whether an action under Title VII was a "tort-like" action. Yet, notwithstanding the lack of argument on the issue, Justice Scalia, in a separate concurring opinion, concluded that the regulation's definition of "damages received on account of personal injuries or sickness" as "an amount received . . . through prosecution of a legal suit or action based upon tort or tort-type rights" was not entitled to deference under *Chevron* because "the IRS's 'tort rights' formulation . . . is not within the range of reasonable interpretation of the statutory text."<sup>87</sup> He relied on the "critical factor" of the juxtaposition of "personal injuries" with the term "sickness" in concluding that the term "personal injuries" refers *only* to physical injuries and "perhaps" to injuries to a person's mental health,<sup>88</sup> not to tort-like injuries to the dignity of a person.<sup>89</sup> "The term 'sickness' connotes a '[d]iseased condition; illness; [or] ill health,' Webster's New International Dictionary 2329-2330 (2d ed. 1950), and I think that its companion must similarly be read to connote injuries to physical (or mental) health."<sup>90</sup> Thus, the only

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84. *Burke*, 112 S. Ct. at 1873.

85. *Id.* at 1871 (quoting *Carey v. Phipps*, 435 U.S. 247, 257 (1978) (emphasis added)).

86. The issue will undoubtedly have to be litigated again in view of the Civil Rights Act of 1991, which, as Justice Blackmun noted, provides that "victims of intentional discrimination are entitled to a jury trial, at which they may recover compensatory damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,' as well as punitive damages." *Id.* at 1874 n.12 (quoting Civil Rights Act of 1991). In view of the expansion of the remedial scope of the statute, the opinion at least implies that a plaintiff able to show intentional discrimination under the new law will now be entitled to exclude the entire award from income under I.R.C. § 104(a)(2).

87. *Burke*, 112 S. Ct. at 1875 (Scalia, J., concurring in the judgment).

88. *See id.* at 1875-76.

89. *Id.*

90. *Id.* at 1875. The passage continues: "It is almost as odd to believe that the first part of the

"reasonable" or "permissible" construction of the statute by the agency is one that conforms to Justice Scalia's textualist reading of the words, which defines personal injuries as encompassing only physical, and perhaps mental-health, injuries.

Justice Scalia's approach in *Burke* is illustrative for several reasons. First, he found the regulation invalid without argument or consideration by the parties themselves or any other court, demonstrating the extent to which he will go in pursuit of textualism.<sup>91</sup> The case also demonstrates that his publicly stated regard for *Chevron* will not result in deferral to an agency's construction of the statute as often as one might imagine in view of his kind words for *Chevron*.<sup>92</sup> His textual approach to both steps under *Chevron* renders *Chevron* deference difficult for him.

Under the first step, the inquiry is whether Congress has spoken directly on the matter, *i.e.*, is there really an ambiguity? His nontextualist colleagues on the Court will look to extra-textual indications, including legislative history, in determining whether an ambiguity exists when the law is sought to be applied to the particular facts before the Court; Justice Scalia will not.<sup>93</sup> He looks solely to

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phrase 'personal injuries or sickness' encompasses defamation, as it would be to believe that the first part of the phrase 'five feet, two inches' refers to pedal extremities." *Id.* He also argued that the term "personal injuries" used in companion subsections must be read as limited to physical injuries; thus use of the term in section (a)(2) must be similarly limited. *Id.* at 1876.

91. Justice Scalia reasoned:

I must acknowledge that the basis for reversing the Court of Appeals on which I rely has not been argued by the United States, here or below. The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one. Even so, there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it—particularly when the judgment will reinforce error already prevalent in the system. I think that is the case here.

*Id.* at 1877 (citations omitted).

92. See Scalia, *supra* note 32; *supra* notes 38-39 and accompanying text.

93. Except for the legislative activity in 1989 described in the text, see *infra* notes 96-100 and accompanying text, legislative history is not much help here in gleaning the meaning of the words "personal injuries." There is none. Similarly, consideration of the "purpose" behind the exclusion reaps no rewards; its purpose is difficult to articulate.

The lack of an apparent purpose for the exclusion is one reason why it has been so difficult for courts to determine whether an award is received on account of "personal injuries," as identifiable purpose can inform interpretation. Many of the components of an award, whether the injury is physical or nonphysical (e.g., defamation), constitute sums that would have been taxable business profits or wages in the ordinary course had the injury not occurred. That the amounts were converted into a damage award involuntarily is not a persuasive factor for exclusion in the case of a damage award not relating to a personal injury; forced realizations are nonetheless taxable. See *Raytheon Prod. Corp. v. Commissioner*, 144 F.2d 110, 113 (1st Cir.) (in absence of statutory provision providing otherwise, damages are treated for tax purposes according to what they were awarded to replace; thus compensation for lost profits is taxable while compensation for damage to goodwill is analyzed as property disposition), *cert. denied*, 323 U.S. 779 (1944). Even awards for pain and suffering constitute an "accession to wealth, clearly realized, over which the taxpayer has complete dominion." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (concluding that punitive damages received in antitrust action are taxable). Most commentators conclude that a simple

the text in determining whether ambiguity exists. Because he does so, he has parted with his colleagues in several cases in which they found ambiguity and proceeded to the second *Chevron* step: considering whether the agency's interpretation of the ambiguous statute was "reasonable," though not necessarily the single correct construction.<sup>94</sup> If Justice Scalia finds no ambiguity under the first step using his textualist analysis, he will not go on to the second *Chevron* step.

Justice Scalia ostensibly viewed *Burke* as requiring analysis under the second *Chevron* step, though his textualist result could easily have been placed under the first *Chevron* step. Because of the words surrounding the term "personal injuries," he in essence found no ambiguity in the term. However, he did couch *Burke* in second-step jargon—whether the agency interpretation was "reasonable"—and showed us that he will apply textualist methods to this step as well. Such an approach severely limits the range of material available to agencies in construing statutes in a "reasonable" fashion, for it ignores such extra-textual material as legislative history, prior rulings and cases, and prior legislative activity. Thus, agencies are restricted regarding the sources they can use in drafting regulations that will pass "reasonableness" muster.

Justice Scalia did not discuss the acceptance of the standard itself by numerous other courts (the disagreements centering only on its application). Nor did he discuss the Internal Revenue Service's own longstanding ruling that damages for alienation of affection, damages for slander or libel of a personal character, and money received by a parent in consideration of the surrender of his right

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"suffered enough" principle must be at work, as in the exclusion in I.R.C. § 101(b) of up to \$5,000 of employee death benefit payments made to the beneficiary of a deceased employee by the deceased's employer. If the purpose of I.R.C. § 104(a)(2) were more easily grasped, the scope of its meaning could be similarly better grasped. See generally Lawrence A. Frolik, *Personal Injury Compensation as a Tax Preference*, 37 ME. L. REV. 1, 5 n.9 (1985) (describing the lack of historical evidence explaining I.R.C. § 104(a)(2)'s exclusion); Robert J. Henry, *Torts and Taxes, Taxes and Torts: The Taxation of Personal Injury Recoveries*, 23 HOUS. L. REV. 701, 723-29 (1986) (describing various purported justifications). For that reason, perhaps a narrower construction of the exclusion over the years would have been wiser. Cf. Popkin, *infra* note 105 (advocating that Congress should decide once and for all extent to which it wishes awards for nonphysical injuries to be excludable).

94. See, e.g., *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2539 (1991) (Scalia, J., dissenting) (using textualist methodology, disagreeing with majority's conclusion that statutory ambiguity existed and that deference to agency was warranted); *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 136 (1990) (Scalia, J., concurring) (using textualist methods to overturn agency's construction of statute in adjudication, rather than through regulation); *Department of the Treasury v. Federal Labor Relations Auth.*, 494 U.S. 922, 928-34 (1990) (Scalia, J.) (using textualist methods to overturn agency's construction of statute in adjudication, rather than through regulation); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113-20 (1988) (Scalia, J.) (using textualist methods to invalidate regulation, an analysis which Justice Stevens's lengthy dissent, in calling for deference to the agency, termed "rather superficial"); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 318 (1988) (Scalia, J., concurring in part and dissenting in part) (using textualist methods to invalidate regulations); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (agreeing with majority's conclusion that statutory text was unambiguous and thus deferral to agency was inappropriate but disagreeing that it was proper to consult legislative history in determining whether ambiguity existed). See also Sunstein, *supra* note 41, at 2089 n.89 (describing a similar textualist approach to *Chevron*'s two prongs in *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987), which resulted in failing to defer to an agency's "fully sensible administrative initiative").

to the custody of his minor child are all excludable as damages received on account of personal injury.<sup>95</sup>

Similarly, his attempt to deal with recent legislative activity shedding some light on the matter was not altogether persuasive. In 1989, the House passed, but Congress ultimately rejected, a bill that would have amended the statute to limit the exclusion to damages received on account of "physical injury or physical sickness" instead of "personal injuries or sickness."<sup>96</sup> The Senate bill had no comparable provision. The House-Senate Conference agreed to leave the term "personal injuries" intact but also agreed to amend the statute specifically to disallow exclusion of *punitive* damages received on account of *nonphysical* injuries or sickness.<sup>97</sup> Thus, the legislation implicitly affirmed, by retaining the general rule that "personal" injuries result in excludable awards and coupling it with the new amendment providing that punitive damages not received on account of "physical" injury were not excludable, that *compensatory* damages for nonphysical yet "personal" injuries of the type long held excludable by numerous courts (such as defamation and violation of First-Amendment rights in addition to discrimination suits) continued to be excludable.

Justice Scalia stated that the amendment merely confirmed that some mental-health injuries may come within the term "personal injuries."<sup>98</sup> Because he did not discuss the numerous cases and rulings allowing exclusion for non-physical yet personal injuries, he did not explain how Congress's amendment succeeded in changing the law so that those cases would now be decided differently. If Congress intended in passing the amendment to overturn the "tort-like" test in the regulation for compensatory damages (in addition to disallowing exclusion for punitive damages received on account of nonphysical injuries) and to instruct that the term "personal injuries" excludes injuries not involving a physical or mental-health assault (*i.e.*, that it wished to overturn the results of all the cases allowing exclusion of compensatory damages for injuries resulting from defamation, discrimination, and violation of civil rights), it chose language singularly inapt to convey that message. Only the rejected House language would have done that. That message is clear only to Justice Scalia.<sup>99</sup> The majority, in a footnote, relied on the long history of acceptance of the "tort-like" test, coupled with the recent legislative activity both affirmatively rejecting limitation of the term "personal injuries" to physical injuries and affirmatively recognizing through the punitive damage provision that "personal" is not confluent

95. Sol. Op. 132, I-1 C.B. 92, 93-94 (1922). This ruling reversed the position taken in a 1920 ruling that "personal injuries" are limited to "physical injuries." See S. 1384, 2 C.B. 71, 71-72 (1920).

96. See H.R. REP. NO. 101-247, 101st Cong., 1st Sess., at 1354-55 (describing proposed § 11641 of H.R. 3299, 101st Cong., 1st Sess. (1989)).

97. See I.R.C. § 104(a) (last sentence). See generally Deborah A. Geier, *The So-Called "Legislative Reenactment" Doctrine*, 55 TAX NOTES 1549, 1553 n.22a (1992) (Letter to the Editor) (discussing *Burke* in connection with legislative reenactment doctrine).

98. See *Burke*, 112 S. Ct. at 1876 n.3 (Scalia, J., concurring).

99. He stated: "[O]ne has little doubt what was intended, and it is not recovery for defamation (or other invasions of 'personal' interests that do not, of necessity, harm the victim's physical or mental health)." *Id.* at 1876.

with "physical," in dismissing Justice Scalia's attack on the validity of the regulation.<sup>100</sup>

Justice Scalia's refusal to demur to the executive branch's interpretation of the statutory language if that interpretation differs from his *own* parsing of the language diminishes the force of many commentators' predictions that Scalia's textualism coupled with *Chevron* would necessarily *strengthen* the executive branch.<sup>101</sup> Rather, Justice Scalia's brand of textualism seems to strengthen only the judge's own power to impose on the executive branch what he or she believes to be the single, proper interpretation of the words<sup>102</sup>—regardless of the executive branch's interpretation of the provision—so long as the provision at issue is sufficiently transitive. While Scalia glorifies *Chevron* in principle, his practice of severely limiting the tools he will use in determining both ambiguity and reasonableness appears to undermine it in those instances where Congress enacts a transitive statute. His approach vests in the textualist judge the sole power to construe anew statutes he or she considers sufficiently precise to call for textualist techniques, even when the statute is administered by an agency. Thus, if Congress writes specifically enough to satisfy a textualist that the words can mean only one thing, the agency's interpretation is ignored. *Burke* exemplifies the less-often-cited paragraph of the same article in which Justice Scalia sings the praises of *Chevron* deference.

I cannot resist the temptation to tie this lecture into an impenetrable whole, by observing that where one stands on this last point—how clear is clear—may have much to do with where one stands on the earlier points of what *Chevron* means and whether *Chevron* is desirable. In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a "strict constructionist" of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. *It is thus relatively rare that Chevron will require me to accept an interpretation which, though reasonable, I would not personally adopt.* Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be im-

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100. See *id.* at 1871 n.6 (Blackmun, J.)

101. See *supra* note 46 and accompanying text.

102. Thus, Justice Scalia's performance in *Burke* deviates from Professor Strauss's conception of *Chevron*:

The problem lies in the use of the word "deference" to describe what is to occur at the second stage. That usage suggests an ultimate judicial responsibility for the outcome that the analysis in *Chevron* in other respects repudiates. Acceptance subject to reasonableness review, not deference, is the necessary posture here. A change not well explained might be rejected as unreasonable and returned to the agency for further consideration; *but one would never reach the point at which a court, declining to defer to the agency's view, supplied its own meaning for the statute.*

Strauss, *supra* note 43, at 1126 (emphasis added). In rejecting the agency's interpretation, Justice Scalia set forth what he believes to be the sole "reasonable" interpretation of the words at issue.

peached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.<sup>103</sup>

Thus, Justice Scalia does not mind *Chevron* deference because he will not often find it necessary to defer, certainly not as often as proponents of *Chevron* thought he would. In those cases in which he will not go on to consider the "reasonableness" of the agency's interpretation because he finds certainty under step one, the next point to stress is his textualist approach to determining what that certainty is. In that analysis, with the agency out of the picture, Congress is also out of the picture in the sense that Scalia will not look to legislative history and other indicia of context and policy surrounding the enactment of the legislation. His interpretation thus might be different from *both* how the agency interprets the text at issue and how another judge who looks to legislative history might interpret the text at issue. Thus both Congress and the executive branch are diminished. It is this *combination* of *Chevron* and textualism that leads to very little deference to *either* Congress or the executive branch in those cases in which Congress writes specifically enough for Justice Scalia to decide that the statute's meaning is self-apparent. Justice Scalia, in short, exalts the judge's power to define the single correct meaning of a transitive statute's text at the expense of the power of *both* Congress (through refusal to consider relevant legislative history and context) *and* agencies (through refusal to look beyond the text in determining either ambiguity or the "reasonable" interpretation of the words), notwithstanding his assertedly humble posture that his textualism diminishes judicial power.

Such an approach did no damage in *Burke* itself. His concurrence failed to carry a single other vote. More important, the foggy purpose and minimal scope of the provision<sup>104</sup> would have meant that little, if *any*,<sup>105</sup> damage would have been done to the structural integrity of the Internal Revenue Code even if his view had carried the day. But Justice Scalia's brand of textualism can lead to serious distortions in those cases that, like *Burke*, deal with transitive language but that, *unlike Burke*, go to the heart of the structure of the tax law.

### III. "COST" AS STRUCTURAL MECHANISM

I chose the example discussed below—the meaning of "cost" in I.R.C. section 1012—not necessarily because it is of overwhelming significance but rather because it exemplifies why the structural integrity of the Internal Revenue Code

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103. Scalia, *supra* note 32, at 521 (some emphasis added; some emphasis in original).

104. See *supra* note 93 (describing the difficulty in ascribing a purpose or justification for the exclusion).

105. See William D. Popkin, *The Tax Treatment of Statutory Torts*, 54 TAX NOTES 1570 (1992) (Letter to the Editor) (urging Justices to do essentially what Justice Scalia did in order to force Congress to decide once and for all extent to which it wishes damages for nonphysical injuries to be excludable).

sometimes requires a nonliteral interpretation of seemingly transitive language. Many more examples could have been added<sup>106</sup> (and for those who read footnotes, two more short examples are given<sup>107</sup>). But I started this Commentary

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106. See, e.g., examples discussed in Zelenak, *supra* note 57.

107. One short example in which textualism frustrated the structural integrity of the concept of "income" is the case of *Adolph Coors Co. v. Commissioner*, 27 T.C.M. (CCH) 1351 (1968). The taxpayer in that case was held to be entitled to exclude the value of lodgings provided him by his "employer"—essentially a wholly owned corporation—under I.R.C. § 119. *Id.* at 1363. Section 119 provides for an exclusion "from the gross income of an employee the value of any . . . lodging furnished to him . . . on behalf of his employer for the convenience of the employer . . . ." The convenience-of-the-employer requirement is interpreted in the regulations as one requiring that the lodgings be furnished for a "substantial noncompensatory business reason." See Treas. Reg. §§ 1.119-1(a)(2) and 1.119-1(b). The court concluded that the presence of Coors on his factory grounds, on which the house owned by the corporation was located, was necessary for the smooth functioning of the business. See *Coors*, 27 T.C.M. at 1363. Thus, he was entitled to exclude the value of the free lodgings, which the corporation itself deducted as an ordinary and necessary business expense. *Id.*

The court thus approached the statutory language and regulations literally, losing sight of the structural reason that justifies I.R.C. § 119 in the first place. That justification is very important when one recalls that the tax base is intended to encompass, in general, core personal consumption, such as the cost of meals and lodgings. See *supra* note 54. The disallowance of a deduction for personal expenses under I.R.C. § 262 ensures, in general, that meals and lodgings are purchased with after-tax dollars. Because an exclusion is the economic equivalent to an inclusion followed by a full deduction, we have to be concerned about the justification for the exclusion under I.R.C. § 119. Horizontal equity—the notion that similarly situated taxpayers ought to be treated similarly—demands sound justification for any provision that allows some taxpayers tax-free personal consumption that the rest of the taxpaying world must purchase with after-tax dollars.

Then-judge (now Justice) Kennedy described the structural premise of the exclusion as follows:

[T]he underlying principle is the idea that forced consumption should in some cases be treated as a transaction that is not dependent on significant elements of personal choice. That is, if the convenience of the employer dictates a certain type of consumption that is likely to be different from that which a taxpayer would normally prefer, this restriction of the taxpayer's preference is an occasion for an "accession to wealth" over which the taxpayer does not "have complete dominion." Cf. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 . . . (1955) (defining gross income in terms of quoted phrases.)

*Sibla v. Commissioner*, 611 F.2d 1260, 1266 (9th Cir. 1980) (Kennedy, J., dissenting) (disagreeing that cash reimbursements for meal expenses of firemen could be excluded from income under authority of I.R.C. § 119).

The Tax Court judge in *Coors* lost sight of that animating justification, which is based on structural notions central to the concept of the tax base. The idea that this employee accepted lodging that he would not have chosen freely, that the lodging was chosen by his employer who required him to live in it for sound business reasons and thus should not be taxable because of the employee's abridgement of freedom, loses all luster when one accepts the reality that a corporation and his sole shareholder have only one mind. The court, in short, "applied [the phrases] in a sterile manner, cut off from the structural principles which underlie the statute." POPKIN, *supra* note 54, at 175. Cf. Tech. Adv. Mem. 91-34-003 (May 6, 1991) (rejecting argument that I.R.C. § 269 disallowed deduction of meals and lodgings paid by wholly owned farming corporation while conceding that family could exclude value of meals and lodging from gross income under I.R.C. § 119).

Similarly, a textual approach to language can lose sight of the underlying structural principle at stake when debt that is not collected because it is "unenforceable" is held not to result in income from the "discharge of indebtedness" within the meaning of I.R.C. § 61(a)(12). Debt that cannot be "enforced," the argument goes, cannot be "discharged." Focusing on whether the debt is "enforceable" loses sight of the structural underpinnings of debt-discharge income. The inclusion of income

with the desire to keep it at a manageably short length (a goal already becoming elusive), and I believe the example discussed in the text illustrates my point sufficiently.

The case of *Philadelphia Park Amusement Co. v. United States*<sup>108</sup> is often used in Basic Tax textbooks<sup>109</sup> in part because it demonstrates most clearly how even ordinary terms—probably the best that Congress could have chosen—must sometimes assume a counterintuitive meaning in order to protect the structural integrity of the income tax. In order to determine proper depreciation and loss deductions due to abandonment, the corporate taxpayer in *Philadelphia Park* needed to ascertain its original basis in intangible property, which I shall call the Railway Franchise. The taxpayer did not originally purchase the Railway Franchise for cash but rather obtained it in a taxable exchange for other property, which I shall call the Strawberry Bridge. The basis rule, then and now, provides that “the basis of property shall be the cost of such property” unless another of the several specific basis rules in the Internal Revenue Code applies<sup>110</sup> (which did not). Thus, the original basis of the Railway Franchise was its “cost.”

What does the term “cost” mean? How much did the Railway Franchise “cost” the taxpayer? The word seems straightforward enough. The current regulation provides: “In general, the basis of property is the cost thereof. The cost is the amount paid for such property in cash or other property.”<sup>111</sup> If you took a survey on the street, I bet most people asked would say that the Railway Franchise cost the taxpayer in *Philadelphia Park* the value with which it had to part in order to obtain it, *i.e.*, the fair market value of the Strawberry Bridge given in exchange for the Railway Franchise. That is the economic outlay with which the taxpayer parted, *i.e.*, the “amount paid for such property in cash or

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from the discharge of indebtedness rests on the tax-benefit rationale. The current structural decision implicit in the income tax is that loan proceeds are excluded from gross income when received on the premise that the borrowed dollars would be repaid to the creditor with after-tax dollars. In this way, taxation of loan proceeds is merely *deferred* until repayment. When repayment fails to transpire because, for example, the creditor is disallowed from enforcing the debt (*e.g.*, under a state usury law), the debtor realizes income in order to account for the fact that the prior assumption, justifying the original exclusion of what would otherwise have been a taxable accession to wealth at that time, proved to be false. There may be *other* reasons for failing to charge a taxpayer with income on what appears to be a discharge of indebtedness, but “unenforceability” of the debt is not one of them. “Such a reliance on the dictionary definition of words focuses on nonissues that arise because of an excessive solicitude to the perceived exactitude of the meaning of words severed from their structural context as part of the Internal Revenue Code.” Deborah A. Geier, Tufts *and the Evolution of Debt-Discharge Theory*, 1 FLA. TAX REV. 115, 169 (1992). See also *id.* at nn.114-15 and accompanying text, n.167, n.217 (discussing same point).

108. 126 F. Supp. 184 (Ct. Cl. 1954).

109. See, *e.g.*, WILLIAM D. ANDREWS, BASIC FEDERAL INCOME TAXATION 1095-1100 (4th ed. 1991); J. MARTIN BURKE & MICHAEL K. FRIEL, TAXATION OF INDIVIDUAL INCOME 80-82 (2d ed. 1992); JAMES J. FREELAND, STEPHEN A. LIND, & RICHARD B. STEPHENS, FUNDAMENTALS OF FEDERAL INCOME TAXATION 124-27 (7th ed. 1991); ALAN GUNN & LARRY D. WARD, FEDERAL INCOME TAXATION 520-22 (3d ed. 1992); POPKIN, *supra* note 54, at 89-91.

110. See I.R.C. § 1012. It was numbered § 113(a) at the time the case was decided.

111. Treas. Reg. § 1.1012-1(a).



other property" in the words of the regulation, in order to "purchase" the property. The court itself in *Philadelphia Park* noted that "[t]he view that 'cost' is the fair market value of the property given is predicated on the theory that the cost to the taxpayer is the economic value relinquished."<sup>112</sup> Thus, if the "ordinary meaning" and "natural reading" of the term "cost" as it is "commonly understood"<sup>113</sup> controlled the inquiry, the taxpayer's original basis in the Railway Franchise would have been the fair market value of the Strawberry Bridge given in exchange for it.

Yet, the court held otherwise. The court held that the "cost" basis of the Railway Franchise must be the fair market value of the *franchise itself* on the date obtained in the exchange, and it so held because of the fundamental role that basis plays in the income tax.<sup>114</sup> "The view that 'cost' is the fair market value of the property received is based upon the theory that the term 'cost' is a tax concept and must be considered in light of . . . the prime role that the basis of property plays in determining tax liability."<sup>115</sup>

The fundamental role of basis as a structural mechanism is to ensure that two fundamental precepts are not violated: "(1) The same dollars should not be taxed to the same taxpayer more than once; and (2) The same dollars should not be deducted by the same taxpayer more than once."<sup>116</sup> Basis, in general, is a running record of amounts that have already been subject to tax and should not be taxed again. Thus, when Taxpayer A earns \$83,333 of gross income on which he pays \$23,333 in tax (being in the twenty-eight percent bracket), converts the remaining \$60,000 cash into property by purchasing Blackacre, and sells Blackacre for \$100,000, he realizes and is taxed on only \$40,000 of new wealth.<sup>117</sup> The \$60,000 in dollar bills would never have been subject to tax again had they not been converted into property, and thus they should not be taxed again when the property is sold for \$100,000.<sup>118</sup>

Assume that the Strawberry Bridge originally owned by the taxpayer in *Philadelphia Park* and exchanged for the Railway Franchise had a fair market value of \$100 and basis of \$50 at the time of the original exchange. Assume also that the fair market value of the Railway Franchise received by the taxpayer in exchange for the Strawberry Bridge had a fair market value of \$125 at the time of the exchange. (Such unequal exchanges do occur.) The taxpayer would have realized and recognized \$75 of gain, consisting of the \$50 unrealized gain embedded in the Strawberry Bridge as well as the additional new wealth of \$25 consisting of the difference in value between the Strawberry Bridge and the Railway Franchise.

Now assume the taxpayer immediately sold the Railway Franchise for \$125 in cash, and this is the transaction before the court. The difference between the

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112. *Philadelphia Park*, 126 F. Supp. at 188.

113. See *supra* notes 11-13 and accompanying text.

114. *Philadelphia Park*, 126 F. Supp. at 189.

115. *Id.* at 188.

116. JOSEPH M. DODGE, *THE LOGIC OF TAX* 20 (1989) (emphasis in original).

117. See I.R.C. § 61(a)(3) and § 1001.

118. The example is taken from POPKIN, *supra* note 54, at 89-91.

\$125 amount realized on the sale and the taxpayer's basis in the Railway Franchise would constitute gain or loss under I.R.C. section 1001. If the taxpayer were to take a cost basis of \$100 for the Railway Franchise under the common definition of the word "cost," which is the "amount paid" by the taxpayer, it would recognize \$25 of gain. But that gain would consist of the \$25 difference in value between the two pieces of property on which the taxpayer already paid tax on the initial exchange. The precept that the same dollars should never be taxed to the same taxpayer more than once would be violated. The court recognized this structural anomaly and adopted an untraditional definition for the term "cost" in order to maintain the structural integrity of the Internal Revenue Code. Using the Railway Franchise's fair market value of \$125 as its original "cost" basis rather than the \$100 value of the Strawberry Bridge given in exchange for it results in no further gain on the second transaction.

When property is exchanged for property in a taxable exchange the taxpayer is taxed on the difference between the adjusted basis of the property given in exchange and the fair market value of the property received in the exchange. For purposes of determining gain or loss the fair market value of the property received is treated as cash and taxed accordingly. To maintain harmony with the fundamental purpose of these sections, it is necessary to consider the fair market value of the property received as the cost basis to the taxpayer. *The failure to do so would result in allowing the taxpayer a stepped-up basis, without paying a tax therefor, if the fair market value of the property received is less than the fair market value of the property given, and the taxpayer would be subject to a double tax if the fair market value of the property received is more than the fair market value of the property given. By holding that the fair market value of the property received in a taxable exchange is the cost basis, the above discrepancy is avoided and the basis of the property received will equal the adjusted basis of the property given plus any gain recognized, or that should have been recognized, or minus any loss recognized, or that should have been recognized.*<sup>119</sup>

That is exactly right. The end result in our hypothetical is that the basis of the Railway Franchise would be \$125 on receipt, which equals the basis of the Strawberry Bridge (\$50) plus the gain that was recognized on the exchange (\$75). The taxpayer is right where it should be: It recognized for tax purposes all the gain it realized on the exchange of the Strawberry Bridge, which included the excess of the fair market value of the Railway Franchise over the Strawberry Bridge. Its basis in the Railway Franchise equalled the fair market value of the franchise itself, which would have been the case if it had simply sold the Strawberry Bridge for cash and then purchased the Railway Franchise with after-tax cash. Any appreciation or depreciation in value from the date of the original exchange would be realized when the Railway Franchise was itself disposed of.<sup>120</sup>

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119. *Philadelphia Park*, 126 F. Supp. at 188-89 (emphasis added).

120. In the case itself, valuation of the franchise was difficult. Because the parties were unrelated and thus were presumed to have bargained at arms' length, the court presumed that the fair

In short, the term "cost" had to be construed as meaning the fair market value of property received in a taxable exchange of property, even though the common understanding of "cost," as well as the regulation interpreting it, would have looked to the fair market value of what was given up. Otherwise, the underlying structural integrity of the income tax would be undermined because of the double taxation of the property appreciation to the same taxpayer. Simply looking up the word "cost" in the dictionary would have led the court to a wrong result.

Of course, textualists such as Justice Scalia do, in fact, contend that they consult the overall structure of a statute in interpreting a single word within it.<sup>121</sup> However, when words are common ones, such as "cost," instead of uncommon words of art, the temptation is great to use that common dictionary definition,<sup>122</sup> particularly because the textualist will not consult many sources to

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market value of the Railway Franchise equalled the fair market value of the Strawberry Bridge, which was more easily subject to valuation. *Id.* at 189. The value of the bridge was used only as evidence, however, regarding the value of the franchise—the real question under the broader theoretical inquiry. *See id.*

121. *See, e.g.,* *Dewsnup v. Timm*, 112 S. Ct. 773, 780-81 (1992) (Scalia, J., dissenting) ("The Court makes no attempt to establish a textual or structural basis for overriding the plain meaning of § 506(d), but rests its decision upon policy intuitions of a legislative character . . .") (emphasis added).

122. The most recent—and justifiable, in my opinion—example of that can be found in *Commissioner v. Soliman*, 113 S. Ct. 701 (1993). *Soliman* was one of the more routine cases, like *Burke*, involving policy with a small "p", *see infra* note 147, not implicating a "structural" issue as that term is used in this Commentary. At issue in that case was whether an anesthesiologist's home office constituted his "principal place" of business within the meaning of I.R.C. § 280A(c)(1)(A). *Id.* at 704-05. *Soliman* spent the majority of his work weeks at the three hospitals where he practiced anesthesiology, tending to his patients. *Id.* at 704. He saw no patients in his home. The home office was used for bookkeeping, professional reading, and like activity, activities concededly essential to his business. *Id.* The lower courts concluded that his home office was his "principal place" of business under all the facts and circumstances and thus allowed deduction of his home office expenses. *Id.*

In reversing the lower courts, Justice Kennedy, for the majority, wrote:

In interpreting the meaning of the words in a revenue act, we look to the "ordinary, everyday senses" of the words. . . . In deciding whether a location is the "principal place of business," the common sense meaning of "principal" suggests that a comparison of locations must be undertaken. This view is confirmed by the definition of "principal," which means "most important, consequential, or influential." Webster's Third New International Dictionary 1802 (1971).

*Id.* at 705-06 (citations omitted). Justice Thomas wrote a separate, concurring opinion in which Justice Scalia joined. Justice Thomas agreed with Justice Kennedy's use of the dictionary definition of "principal" but disagreed with Justice Kennedy's further assertion that

[i]n determining the proper test for deciding whether a home office is the principal place of business, we cannot develop an objective formula that yields a clear answer in every case. The inquiry is more subtle, with the ultimate determination of the principal place of business being dependent upon the particular facts of each case. There are, however, two primary considerations in deciding whether a home office is a taxpayer's principal place of business: the relative importance of the activities performed at each business location and the time spent at each place.

*Id.* at 706.

Justice Thomas wrote:

I certainly agree that the word "principal" connotes "most important," . . . but I do not agree that this definition requires courts in every case to resort to a totality-of-the-circumstances analysis when determining whether the taxpayer is entitled to a home office deduction under § 280A(c)(1)(A). Rather, I think it is logical to assume that the single location where the taxpayer's business income is generated— i.e., where he provides goods or services to clients or customers—will be his principal place of business.

*Id.* at 709 (Thomas, J., concurring).

I agree with looking to the dictionary definition here in defining "principal." There is no reason based on the structural integrity of the Code to interpret "principal place" as "essential place" without comparing the location at issue to other locations. "Principal" does indeed connote a ranking of places. That is, it is not necessary to give it an unnatural reading in order to avoid frustrating the larger conceptual structure. Congress sought in enacting I.R.C. § 280A (though such evidence would be irrelevant to Justice Scalia) to *restrict* what had been unjustified deductions of home office expenses under the general business deduction section, I.R.C. § 162, which allows deduction of current expenses so long as they meet the much less stringent requirement of being "appropriate and helpful." See *Commissioner v. Tellier*, 383 U.S. 687 (1966) (interpreting "ordinary and necessary" requirement of I.R.C. § 162 to mean no more than expense be "appropriate and helpful").

Moreover, there is another bit of "context" that is important here. With depreciation deductions of real estate under today's lengthened schedules not worth much, the chief benefit for Soliman under the lower court decisions was that his otherwise nondeductible commuting expenses of traveling from "home" to work were transformed into deductible "business expenses" of traveling from his "principal place" of business to his secondary places of business. The home office deduction at issue in *Soliman* was \$1,259. The deduction for his commuting expenses, which the Government conceded turned on whether he won or lost regarding the location of his "principal place" of business, exceeded \$3,700. With costs of automobiles increasing dramatically and the recovery period for cars a short five years under I.R.C. § 168(e)(3)(B)(i), the deductibility of Soliman's commuting expenses would have been the more significant result of a finding in his favor.

When the tax term at issue is not a "common" one that can be looked up in Webster's Dictionary but rather a term of art not used in common parlance, Justice Scalia is much more open to looking beyond the words of a statute. For example, he joined without comment in the unanimous opinion of Justice Blackmun in the 1991-1992 term in *INDOPCO, Inc. v. Commissioner*, 112 S. Ct. 1039 (1992), which concluded that the term "capital expenditure" includes the legal and investment banking fees incurred by a target corporation in a friendly takeover. The taxpayer had argued that the outlay could be currently deducted as a business "expense" under I.R.C. § 162 because only those outlays creating or improving a separate and distinct asset could constitute nondeductible "capital expenditures." *Id.* at 1044. I.R.C. § 263(a)(1) disallows deduction for capital expenditures, defined as "[a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate." The regulations give a list of examples, each of which is connected with property. See *Treas. Reg. § 1.263(a)-1 to -2*.

In holding that the creation or improvement of a separate and distinct asset is a sufficient but not *necessary* condition for an outlay to constitute a nondeductible capital expenditure, Justice Blackmun returned to first principles, to structural principles. See *supra* notes 54-56 and accompanying text and *infra* note 147 (describing structural principles). He returned to the notion underlying the dichotomy between currently deductible "expenses" under I.R.C. § 162 and nondeductible "capital expenditures." That underlying principle is one of matching, of clearly reflecting income. In theory, a currently deductible "expense" goes chiefly toward producing this year's earnings and so should offset this year's earnings by a current deduction in order to reflect income clearly. The prototypical capital expenditure—the "cost of acquisition . . . of buildings . . . and equipment . . . having a useful life substantially beyond the taxable year," *Treas. Reg. § 1.263(a)-2(a)*—helps produce income beyond the current year. A current deduction would distort income. The nondeductibility creates basis, however, which will be deducted over time in the form of depreciation deductions if the asset has an ascertainable useful life. In that way, the outlay offsets future income produced in part by that outlay. Thus, the dichotomy between an "expense" and a "capital expendi-

identify any larger structural concerns.<sup>123</sup> In tax law in particular, that is where the risk lies. The risk of double taxation in our *Philadelphia Park* hypothetical would have been particularly great because the regulation itself adopted the "common understanding" of the term. The factual context before the court coupled with the court's sensitivity to structural concerns undergirding the income tax led the court to the right, though nonliteral, interpretation of the term "cost." Justice Scalia would probably have ruled otherwise.

#### IV. "COST" AS PURE POLICY CHOICE

Defining the scope of the meaning of the term "cost" in I.R.C. section 1012 is not merely an historical issue. The Bush Administration showed interest over the summer and fall of 1992 in attempting to impose through executive fiat what it could not achieve through legislation: a capital-gains tax cut. The method the Administration proposed for achieving this end was the issuance of a regulation by the Treasury Department reinterpreting the word "cost" in I.R.C. section 1012 to include adjustments over time to account for inflation.<sup>124</sup>

In early August of 1992, Housing Secretary Jack Kemp, along with Senators Connie Mack of Florida, Trent Lott of Mississippi, Bob Kasten of Wisconsin, and Malcolm Wallop of Wyoming, as well as Representatives Vin Weber of Minnesota and Newt Gingrich of Georgia, sent a memorandum to President Bush urging him to issue an Executive Order mandating the indexation of basis to account for inflation.<sup>125</sup> Increasing the basis of property would, of course, reduce the amount of income tax paid (or increase the loss) on property when sold by reducing the amount of taxable gain (or increasing the amount of loss)—the difference between basis and the sales proceeds. The proposal was actually much broader than a backdoor capital-gains tax cut of the kind that has been repeatedly considered and rejected by Congress, most recently and seriously in 1982.<sup>126</sup> Because it would apply to all purchased property, including such non-

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ture" is really nothing more than a matter of proper timing and better matching of income with the outlays incurred in producing that income. That concept is not found in any single code section; it is a structural principle that is the product of the entire scheme of the Code. In *INDOPCO*, the long-term benefits accruing to the taxpayer because of the acquisition required capitalization of the acquisition expenses.

123. See, e.g., *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2038 n.2 (1992) (Scalia, J.) ("The dissent believes petitioner's position on this point to be supported by the history and structure of the ADA (sources it deems 'more illuminating' than a 'narrow focus' on the ADA's language . . .). . . .") (emphasis added).

124. See generally Lawrence Zelenak, *Does Treasury Have Authority to Index Basis for Inflation?*, 55 TAX NOTES 841 (1992) (considering proposal); Geier, *supra* note 97 (commenting on Professor Zelenak's piece).

125. See David Wessel & John Harwood, *Conservatives Trying to Force Bush to Back Tax-Cut Plan at Convention*, WALL ST. J., Aug. 10, 1992, at A12 (reporting on memorandum); *A Message for Houston*, WALL ST. J., Aug. 11, 1992, at A14 (reprinting portions of the memorandum, including the tax provision).

126. See Zelenak, *supra* note 124, at 844 n.37 (discussing legislative activity considering inflation adjustments).

capital assets as inventory, it would be far broader in scope than any prior congressional proposal regarding inflation adjustments.

On August 26, 1992, the National Taxpayers Union Foundation and the National Chamber Foundation entered the fray by releasing a ninety-page study concluding that the President, through the Treasury Department, had the authority to require indexation. The authors of that study argued that the President possessed this authority because I.R.C. section 1012 did not specifically preclude such an interpretation by specifically limiting the determination of cost to the date of purchase.<sup>127</sup> Under *Chevron*, the authors continued, the courts should defer to the new interpretation.<sup>128</sup>

On August 31, 1992, Charles J. Cooper, one of the two chief authors of the study and a former Assistant Attorney General in the Reagan administration, published an op-ed piece in the *Wall Street Journal* which summarized his argument.<sup>129</sup> The *Journal* accompanied the piece with a pungent editorial calling on President Bush to exercise this new-found power to require inflation adjustments through his supervisory power over the Treasury Department.<sup>130</sup> The Justice Department responded with a report concluding that the President had no authority to institute the measure.<sup>131</sup> That report prompted the President to drop the idea,<sup>132</sup> even though Mr. Cooper reacted with a second op-ed piece in the *Wall Street Journal* decrying the reasoning of the Justice Department.<sup>133</sup>

Let's assume for a moment that the President did not simply issue an Executive Order<sup>134</sup> but rather used his powers of persuasion under *Myers v. United States*<sup>135</sup> to cause the Treasury Department to publish a new proposed regulation reinterpreting the word "cost" in I.R.C. section 1012 to include inflation adjustments. Let's assume that comments were received and considered and the

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127. Joanna Richardson, *Treasury Empowered to Index Gains Through Regulation, Study Finds* (News), 56 TAX NOTES 1123 (1992) (describing reports).

128. *Id.* at 1123-24.

129. Charles J. Cooper, *Capital Gains Tax and Presidential Power*, WALL ST. J., Aug. 31, 1992, at A10.

130. *An Act of Leadership*, WALL ST. J., Aug. 31, 1992, at A10 (editorial).

131. *Capital-Gains Indexing Is Dealt Blow by Agency*, WALL ST. J., Sept. 3, 1992, at A12.

132. *Bush Drops Tax-Cut Proposal*, N.Y. TIMES, Sept. 4, 1992, at A13.

133. Charles J. Cooper, *Capital Gains, as Seen by Congress in 1918*, WALL ST. J., Sept. 4, 1992, at A16.

134. The executive branch would seem to be on firmer ground if it promulgated a regulation pursuant to statutory authority rather than relied on the general power to issue Executive Orders. I want to make the hypothetical as clean as possible so as to get the issue to the courts under *Chevron*.

135. 272 U.S. 52 (1926). Professors Strauss and Sunstein have written:

[T]he authority to make the ultimate decision rests where Congress has placed it—in the relevant agency. This understanding stems from the notion, set out in *Myers v. United States*, that the President has the authority to discharge executive officials, but at least in some cases, no power to make the ultimate decision (except insofar as the threat of discharge amounts to such power). Under this view, the President's remedy for conduct of which he disapproves is the politically costly one of removal. Short of that, his authority . . . is consultative and supervisory.

Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 191 (1986) (footnote omitted).

regulation issued in final form with reasoned justifications of the sort relied upon by its proponents.<sup>136</sup> Assume further that a taxpayer with standing could be found to challenge the validity of the regulation,<sup>137</sup> and the matter came before Justice Scalia. How might he decide the case? The question's answer is subsumed within the larger issues regarding the proper analytical approach to statutory language and to administrative rule making under *Chevron*.

A judge who used an originalist approach, *i.e.*, one who is not averse to using legislative history, would have no difficulty in ruling the regulation invalid. Congress has debated and considered many times whether to index the basis of assets for inflation—the Senate actually passed a bill to do so in 1982—but has declined thus far to enact a statute.<sup>138</sup> That would be enough for originalist judges to conclude that the word “cost” was not intended by Congress to include inflation adjustments.

A judge who took care to protect the *current* structural integrity of the Internal Revenue Code should also rule the regulation invalid, even if he or she would refuse to consider the legislative history of the issue. That is, even if past legislative decisions to reject basis indexation are ignored as not sufficiently indicative of whether Congress “has directly spoken to the precise question at issue” under the first *Chevron* step, the word “cost” cannot be viewed in isolation when deciding, under the second *Chevron* step, whether an interpretation is “permissible” because “reasonable.”<sup>139</sup>

“Cost” under I.R.C. section 1012 is not the sole parameter for measuring property basis. As described below, at least one other basis provision, I.R.C. section 1014, contains language that cannot be similarly interpreted to include post-acquisition inflation adjustments. An interpretation of a word in one basis section that would require inflation adjustments for some property, when legislative language in at least one other basis section would not allow such an interpretation and such adjustments for precisely the same property, would violate the structural integrity of the Internal Revenue Code and thus would be an unreasonable interpretation.

Let's indulge for a moment the notion that “cost” in I.R.C. section 1012 could be interpreted to include inflation adjustments because, as Mr. Cooper argued,<sup>140</sup> the statutory words do not limit the determination of “cost” to the date of purchase. He argued that absent such a statutorily imposed time limitation, the term “cost” might rationally be viewed as the economic investment in

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136. See Strauss, *supra* note 51, at 442 (describing importance of “the behavior of formal justification” as opposed to contrary position that “since a statute was imprecise or broadly worded, the agency may do anything it pleases, or that a court or other outside observer cannot competently tell whether it is or is not acting within authority”).

137. See Zelenak, *supra* note 124, at 841-42 (noting and discussing the standing problem); TAX NOTES TODAY, November 16, 1992 (reporting a report issued by Harry G. Gourevitch of Congressional Budget Office that questioned whether member of Congress who voted against statutory indexing provision might have standing to challenge such regulation).

138. See Zelenak, *supra* note 124, at 843-44.

139. See *supra* notes 40-41 and accompanying text (discussing *Chevron* test).

140. See *supra* notes 127-29 and accompanying text.

purchased property, adjusted to account for inflation since purchase.<sup>141</sup> I.R.C. section 1014, however, which prescribes the basis of property acquired from a decedent rather than by purchase, provides that the basis of such property shall be its "fair market value" and does provide a precise time limitation for the determination of that value: "at the date of the decedent's death." Unlike I.R.C. section 1012, I.R.C. section 1014 limits the determination of basis to a single day. Unlike an unanchored "cost," "fair market value of the property on the date of the decedent's death" cannot reasonably be interpreted to require inflation adjustments *after* that date. Furthermore, I.R.C. section 1016, which contains a list of post-acquisition adjustments to basis, contains no language that would permit post-acquisition inflation adjustments.

Prior congressional proposals to adopt inflation adjustments did not simply provide for a statutory definition of "cost" under I.R.C. section 1012 that allowed such adjustments for purchased property; they comprehensively took account of all the various basis rules and whether the asset at issue was a "capital asset" that should be entitled to inflation adjustments.<sup>142</sup> Moreover, indexing for inflation must be structurally comprehensive if it is to avoid introducing intolerable distortions far *worse* than the lack of *all* inflation adjustments. For example, debt is not indexed for inflation and could not be as a matter of regulation. The result, of course, is the repayment of debt with deflated dollars in times of significant inflation. The complexity that would attend indexing debt (*i.e.*, charging such debtholders with income) to complement the indexed basis of property is one of the specific reasons why Congress has chosen to reject comprehensive indexation.<sup>143</sup> In short, current structural symmetry—between "purchased" and "inherited" property as well as between property and debt—would dictate that a regulatory definition of the word "cost" in I.R.C. section 1012 that included inflation adjustments is an unreasonable interpretation.<sup>144</sup>

A judge who both ignored legislative history and failed to appreciate the larger current structure that militates against the reasonableness of an interpretation of "cost" under I.R.C. section 1012 to include inflation adjustments might nevertheless rule the regulation invalid on a third ground. Because the decision whether to index property basis for inflation implicates fundamental policy, it is

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141. Perhaps we could also argue that a carryover basis, such as one prescribed under I.R.C. § 1015 pertaining to gifts, could also be indexed if the transferor's basis was originally determined under I.R.C. § 1012 because the transferee's basis "is the same as it would be in the hands" of the transferor. Similarly, perhaps a substitute basis, such as one determined under I.R.C. § 1031(d), could be indexed if the basis of the exchanged property was originally determined under I.R.C. § 1012 because the basis in the property received is the "the same as that of the property exchanged."

142. See Zelenak, *supra* note 124, at 843-44 (discussing measures).

143. The indexation of the tax brackets themselves to avoid "bracket creep" is an unrelated issue: The proposed inflation adjustments to property affect the tax base against which those rates are applied and thus raise distinct and separate issues.

144. See also Lee A. Sheppard, *Some Other Reasons Why Treasury Cannot Index Gains*, 56 TAX NOTES 1249 (1992) (News Analysis) (exhaustively critiquing validity of proposed regulation).



one that should be explicitly made by Congress in express statutory language.<sup>145</sup> Whether the “dollars” that are taken into account under the Internal Revenue Code should be inflation-adjusted dollars is a fundamental political choice, a policy issue. The issue is not driven by “structural” concerns in the sense in which the term “structural” is used in this Commentary.<sup>146</sup> That is, interpreting the word “cost” in an uncommon fashion (to include inflation adjustments) is not necessary to accord with the larger theoretical construct of “income” *already in place*<sup>147</sup> under the Internal Revenue Code. The rule that the same dollars should not be taxed to the same taxpayer more than once (the structural principle at stake in *Philadelphia Park*) does not answer the prior *policy* choice regarding how those dollars themselves should be measured. The decision whether to index is pure Policy with a capital “P” under the current Internal Revenue Code.

So how would Justice Scalia rule? Though his textualist stance combined with *Chevron* deference purports to further certainty without litigation, the answer is not entirely clear. But my best educated guess is that he would invalidate the regulation—the correct result in my opinion—for the same reasons that he would probably have ruled *incorrectly* in the *Philadelphia Park* case. The language is sufficiently transitive that there is a good chance that Justice Scalia would never get to the second *Chevron* step where deference might be possible. He would probably define cost in its “ordinary” sense to mean original purchase price, unadjusted for inflation, under his textualist approach to step one of *Chevron*. If my hunch is correct, that result further evidences that textualism combined with *Chevron* will *not* necessarily lead to expanded executive power. He would likely have been a thorn in the Bush Administration’s side in this case.

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145. See *supra* note 60 and accompanying text and *infra* note 167 (discussing appropriateness of textualism in this context).

This approach to fundamental policy choices implies that *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), see *infra* notes 150-61 and accompanying text, should in fact have used textualism and ruled in favor of Bob Jones University because the policy decision was a fundamental one that should have been made by Congress. A different sort of pragmatism, however, entered into that case that would not enter into most statutory interpretation cases. With the exception of Justice Rehnquist, the Justices obviously did not want to be viewed by the general public as blessing racial discrimination in education. The Court knew that a decision based on statutory interpretation principles—principles that recognize the institutional competence of Congress to make the sort of fundamental policy decision that is inherent in deciding whether to allow tax exemption to educational institutions that discriminated on the basis of race—would be misunderstood by the public. Most would appreciate only the end result: that the *Supreme Court* (not Congress) allowed a school that discriminated on the basis of race to maintain its tax exemption. In that sense, *Bob Jones University* is a unique case, a case that, because of its subject matter, is not helpful in making generalized statements about statutory interpretation.

146. See *supra* notes 54-57 and accompanying text (describing structural concerns in tax).

147. “Structural” arguments, as used here, perhaps might be best understood as representing “Policy” with a capital “P” instead of a small “p,” policy in the sense of the prior decisions regarding the overall structure of the income tax and embedded in the Internal Revenue Code as a whole. That is, if Congress should adopt indexing, the resulting “structure” of the Internal Revenue Code would be fundamentally altered. An issue could arise under that new structure that could then require a nonliteral, nontextual approach to a common word in order to protect that *new* fundamental structure.

My guess that he would invalidate the regulation seems to be contrary to the following statement written by Justice Scalia:

[T]he capacity of the *Chevron* approach to accept changes in agency interpretation *ungrudgingly* seems to me one of the strongest indications that the *Chevron* approach is correct. It has always seemed to me utterly unrealistic to believe that when an agency revises one of its interpretative regulations, . . . the agency was admitting that it had "got the law wrong." And it has thus seemed to me inappropriate to look askance at such changes, as though we were dealing with a judge who cannot make up his mind whether the rule in *Shelley's Case* applies or not. Rather, the agency was simply "changing the law," in light of new information or even new social attitudes impressed upon it through the political process—all within the limited range of discretion to "change the law" conferred by the governing statute. *Chevron*, as I say, permits recognition of this reality.<sup>148</sup>

Yet, I believe that expansive position pertains only to those cases in which the language before the court is sufficiently intransitive to allow Justice Scalia to get beyond *Chevron's* first step.

His reference to changes in social attitudes as a legitimate justification for a changed interpretation evokes the tax case most often cited in the literature<sup>149</sup> as demonstrating dynamic statutory interpretation, *Bob Jones University v. United States*.<sup>150</sup> The Supreme Court there affirmed the validity of an interpretation of I.R.C. section 501(c)(3), issued in a Revenue Ruling,<sup>151</sup> that revoked the tax-exempt status of educational institutions that discriminated on the basis of race.<sup>152</sup> An originalist interpretation would have resulted in ruling the new interpretation invalid; the Code section was adopted at a time when *Plessy v. Ferguson*<sup>153</sup> was the law of the land. Disdaining originalism, however, the majority agreed with the Internal Revenue Service that such organizations are not "charitable," and thus the ruling's interpretation that such entities are not entitled to

148. Scalia, *supra* note 32, at 518-19.

149. See, e.g., Eskridge, *Dynamic Statutory Interpretation*, *supra* note 24, at 1546-49; Eskridge & Frickey, *supra* note 3, at 343-44; Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 534.

150. 461 U.S. 574 (1983). A more recent and just-as-dramatic change in agency policy upheld under *Chevron* is found in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). The regulations upheld in that case prohibited doctors at federally funded clinics to discuss with clinic patients the option of abortion. *Id.* at 1765. These regulations took an about face from earlier regulations that permitted doctors to discuss abortion, though abortions could not be performed at the clinics. *Id.* at 1768-69. There was no change in the statutory law underlying the regulations.

151. Rev. Rul. 71-447, 1971-2 C.B. 230. The Court did not focus upon the status of the authority as a revenue ruling, which is issued by the Internal Revenue Service without notice or comment and which has been interpreted in other cases as amounting to no better authority than the Service's litigating position. See, e.g., *Armco, Inc. v. Commissioner*, 87 T.C. 865, 868 (1986) (referring to authority at issue as no better authority than revenue ruling, which only states "the institutional litigating position of the Internal Revenue Service"). See generally Linda Galler, *Emerging Standards for Judicial Review of Revenue Rulings*, 72 B.U. L. REV. 841 (1992) (analyzing appropriate status of revenue rulings).

152. *Bob Jones Univ.*, 461 U.S. 574 (1983).

153. 163 U.S. 537 (1896) (affirming separate-but-equal doctrine).

tax exemption under I.R.C. section 501(c)(3) was reasonable.<sup>154</sup> The Court also relied heavily upon the fact that during the twelve-year interim between the issuance of the controversial ruling and the *Bob Jones* decision, thirteen bills were introduced to overturn the executive interpretation of I.R.C. section 501(c)(3), but none emerged from committee.<sup>155</sup> The majority thus concluded that Congress's inaction should be construed as an endorsement of the radical departure from the prior interpretation of the unamended words of the statute.<sup>156</sup> Notwithstanding the apparent congruence between Justice Scalia's quoted language regarding changed social attitudes and the majority's result in *Bob Jones*, I think Justice Scalia, had he been on the Court at the time, would have joined Justice Rehnquist's dissent in that case. In the first place, he would have, unlike the majority, ignored as irrelevant the legislative history concerning the failed bills to overturn the new interpretation. More importantly, the specificity of the language would not have allowed him to defer. Just as in *Burke*<sup>157</sup> and in our hypothetical "cost" case, Justice Scalia would likely have never gotten to the second *Chevron* step in *Bob Jones*, where deference to a changed agency interpretation because of changed circumstances is possible, because he would have found no ambiguity in the first place under the first *Chevron* step using his textualist approach.

A strict textualist approach is precisely what Bob Jones University argued in the case itself.<sup>158</sup> The language in I.R.C. section 501(c)(3) provides for tax exemption for all entities "operated exclusively for religious, charitable, . . . or educational purposes . . . ."<sup>159</sup> Bob Jones University argued that the Internal Revenue Service could not replace the disjunctive word "or" with the conjunctive word "and," thereby requiring institutions to operate with *both* charitable and educational purposes in order to maintain their tax-exempt status. Only Congress could do that. "Educational" and "religious" organizations need not,

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154. *Bob Jones Univ.*, 461 U.S. at 596-99.

I disagree with Professor Sunstein's characterization of the case. He states that the Supreme Court held that the Internal Revenue Service *could not grant* tax deductions to private schools that discriminate on the basis of race. . . . The *Bob Jones* decision is best understood as an effort to ensure that the IRS takes account of the widespread social antagonism toward racial discrimination, since that antagonism now forms a part of the general thrust of contemporary "public policy."

Sunstein, *supra* note 149, at 534 (footnote omitted; emphasis added). The Internal Revenue Service is the entity that promulgated the Revenue Ruling at issue in the case that newly interpreted I.R.C. § 501(c)(3) to prohibit tax exemption (not "deductions") for educational institutions that discriminated on the basis of race. It was Bob Jones University that challenged the lawfulness of that new Internal Revenue Service interpretation. The Court was not confronted with a case in which the Service argued that it *could* interpret the words to allow tax exemption for schools that discriminate, resulting in a decision by the Court that "it could not," in the words of Professor Sunstein. The Court held only that the Service's interpretation was reasonable because "the responsibility for construing the Code falls to the IRS." *Bob Jones Univ.*, 461 U.S. at 597.

155. *Bob Jones Univ.*, 461 U.S. at 600-01.

156. *See id.* at 601.

157. *See supra* notes 76-105 and accompanying text (discussing *Burke*).

158. *See* 461 U.S. at 585-86.

159. Emphasis added.

the plaintiff argued, also be "charitable" under the statute as written, as each is a separate and independent ground establishing tax-exempt status. The statute did not by its terms vest authority in the Service to decide whether certain entities literally falling within the language of I.R.C. section 501(c)(3) should nevertheless be denied tax-exempt status.<sup>160</sup> Moreover, the longstanding history of the prior interpretation, which allowed racial discrimination by tax-exempt educational institutions, would have been important to Justice Scalia under the first *Chevron* step. He has stated:

I should also add that the existence of a "long-standing, consistent agency interpretation" that dates to the original enactment of the statute may be relevant to the first step of *Chevron*—that is, it may be part of the evidence showing that the statute is in fact not ambiguous but has a clearly defined meaning.<sup>161</sup>

The longstanding interpretation of "cost" in I.R.C. section 1012 as original purchase price without adjustment for inflation would, I believe, have buttressed Justice Scalia's conclusion that the hypothetical case should be resolved under *Chevron* step one against the validity of the regulation. Thus, in our hypothetical case, Justice Scalia would have ruled correctly, I believe, though many might disagree with the textual road he would likely have taken to get there. Might not the better approach be to consider the *pragmatic mix* of the language itself, the current structure of the Internal Revenue Code militating against the reasonableness of the interpretation, the prior legislative history indicating that such an interpretation is not tenable, as well as the fact that such fundamental policy ought to be made by Congress?

## V. EPILOGUE

In his lay primer on deconstruction, David Lehman describes the difference between what others have termed "hard-core" and "soft-core" deconstruction,<sup>162</sup> finding the former leading to the apocalyptic abyss while finding the latter a helpful tool among many in literary studies.<sup>163</sup>

[Hard-core deconstruction] is "hard" in the sense of being putatively rigorous (or rigid, depending on your viewpoint) and defiantly difficult to follow. It is programmatic. It asks to be taken as something more than a critical method—something like an antitheological theology.

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160. See 461 U.S. at 585-86.

161. Scalia, *supra* note 32, at 518.

162. LEHMAN, *supra* note 3, at 117-31.

163. Lehman writes:

The word [soft-core deconstruction] is a handy one to have, and the tactics that go with it—the tendency, for example, to focus one's attention not on the center but on the margins of a text or an event—can be fruitfully used. Hard-core deconstruction is something else again. It proceeds not from the love of literature but from the tacit assumption that literature exists primarily to illustrate the laws of a critical doctrine. Worse, it asks to be accepted in toto, not adapted into a critical instrument to be used in discretion. The hardening of a theory into dogma, wrote R.P. Blackmur, carries the danger of "fanatic falsification."

*Id.* at 124.

By contrast, soft-core deconstruction is an elastic critical concept and is meant to be used with a lighter touch; a synonym might be "practical" or "applied" deconstruction. It differs from hard-core deconstruction in having a strictly provisional value and an utterly pragmatic function; its use does not imply the critic's subscription to deconstructive doctrine in any larger sense. Soft-core deconstruction may serve to describe virtually any form of critical interpretation that is concerned with the tricky relations between language and meaning, between what is said and what is hidden, in a text. It refuses the mandatory trip to the linguistic abyss but retains the sense of deconstruction as a devastating critique, an expose, an unmasking . . .<sup>164</sup>

Soft-core deconstruction is no more than one tool among many, a means to an end in the larger endeavor of exploring those texts that lend themselves particularly well to its technique.<sup>165</sup> Hard-core deconstruction is pure theory, an end in itself, independent of the text. For the hard-core deconstructionist, the deconstructed text is secondary to the theory itself; the *text itself* becomes the tool that is used to exemplify the ends of the theory. Hard-core deconstruction "displays the critic's monumental conceit; it depicts [the author of the deconstructed text] as no more than an unwitting mouthpiece for the theories of [the deconstructionist]. That is what opponents of deconstruction have in mind when they castigate it for parading the critic's superiority over the text."<sup>166</sup> A

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164. *Id.* at 118-19.

165. One example of soft-core deconstruction is recounted by Lehman as follows:

Deconstruction's methods and concepts, used selectively and without doctrinal fervor, can sometimes bring us closer to the frequently enigmatic workings of some of our favorite books or films. The poet and critic John Hollander, a masterly teacher, demonstrates the pedagogical virtues of soft-core deconstruction when he observes that "Charlie Chaplin deconstructs public statuary in the opening frames of *City Lights*." No other word will work so well to describe the effect of the brilliant sequence in which the tramp, played by Chaplin, sabotages the ceremonial unveiling of a new civic monument. The scene opens in a modern metropolis, downtown. In the background is the monument—a group of three statues—draped in sheets. At the podium, speeches are delivered by pompous bigwigs. There is a fanfare of trumpets. Then the wraps come off, and there, to everyone's surprise, is the tramp, asleep in the lap of the central statue. He wakes up, tries to escape—and his trousers are impaled by the sword of the adjacent statue. A policeman in the crowd is outraged by these antics but, luckily for the tramp, the Star Spangled Banner is played at just this moment, and everyone, including the policeman, must stand at attention. What Chaplin has done in this sequence is to unveil an unveiling. By showing us the tramp comfortably sleeping in the statue's lap, Chaplin deconstructs the monument by turning it into its opposite. He makes us see the monument for what it is—cold and forbidding—by depicting it, for the moment, as welcoming and homey. The incongruity of the tramp's presence drives home the point. The monument is seen for what it really is when the tramp's trousers are impaled by the bronze sword. For now we recall that the statue is a monument to "Peace and Prosperity"—claims that are belied by the tramp's very existence and this depression year 1931. Humanized by the tramp, the statue signifies not "Peace and Prosperity" but the reality that it was meant to exclude—poverty and the threat of violence. Minus the tramp, it is merely a monument to human vanity and wishful thinking.

*Id.* at 120-21.

166. *Id.* at 131. See *id.* at 125-31 (providing two examples of hard-core deconstruction too lengthy to be reprinted here).

greater understanding of the text itself, the goal of literary studies, is lost in hard-core deconstruction.

The theology of hard-core textualism of the sort championed by its doyen, Justice Scalia, suffers from the same criticisms as its virtual antithesis, the theology of hard-core deconstruction. Hard-core deconstruction insists upon a chaotic lack of definitive meaning, often in spite of the text. Hard-core textualism insists upon the single meaning arrived at by a sterile parsing of the statutory words, often in spite of the factual and statutory context. Both ignore the greater ends for which the technique is ostensibly employed. The ultimate goal in statutory cases—to apply the statute in question so as to realize rather than undermine its reason for being at that point in time in that particular case—can be sacrificed to the theory of hard-core textualism. The means obstinately become the ends; theory, hardened into dogma, subsumes purpose; the jurist is not really a contemplative “judge” but rather is an unthinking automaton with a dictionary.

What pragmatic legal theorists might call soft-core textualism is, like soft-core deconstruction, a practical and pragmatic tool, one which can be judiciously used as the means to arrive at the greater ends. Though hard-core textualists are suspicious of the perceived elasticity of soft-core textualism, soft-core textualism is itself constrained by the text. The point of disagreement between the two camps is simply the scope of the constraining “text.” The “text” to the hard-core textualist is the “pure” text of the statute, definite and static, in large part divorced from context. The “text” constraining the decision of the soft-core textualist is not so constipated. That is, soft-core textualism is constrained by—but does allow consideration of—external context.

Perhaps that external context might demonstrate that a nonliteral interpretation is necessary in order to implement the implicit structural framework of the current statute, as pondered here under the Internal Revenue Code and as exemplified by *Philadelphia Park*. Perhaps that external context might demonstrate that a hard-core textualist approach is warranted because the ambiguity involves a significant, fundamental policy choice that should explicitly be made by Congress, such as whether to index the basis of certain property for inflation.<sup>167</sup> Perhaps that external context might demonstrate that a dynamic statu-

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167. Wilkinson and Volkmann, writing in 1975, provided another example from the field of Indian Law. They argued that courts should adopt a hard-core textualist approach to statutory language when trying to decide whether Congress intended to abrogate prior Indian treaties which were inconsistent with later statutory enactments. See Wilkinson & Volkmann, *supra* note 60. Only Congress has the authority to abrogate a treaty, and courts ought to insist upon statutory language evidencing that intent rather than infer from snippets of legislative history that this very significant policy choice with a capital “P”, see *supra* note 147, was in fact made, even though such a hard-core textualist approach is *not* appropriate in *all* contexts.

In deciding whether to apply the rule of express legislative action [what we could here call “textualism”], courts have based their determinations, either explicitly or implicitly, upon the importance of the subject matter at issue. The Supreme Court has stated that the rule is appropriate in “traditionally sensitive areas,” and a lower court has noted that the Supreme Court has applied the rule in cases “limiting the free exercise of important rights.” Scholars have found the rule applicable to “large decisions of policy” and “funda-

tory interpretation is warranted because either a strict textualist or originalist interpretation would frustrate a dramatic swing in policy since enactment of the statute at issue.<sup>168</sup> Finally, perhaps that external context might demonstrate that the judicious use of originalism, with its look to legislative history, actually helps put the picture in focus for the judge who has the hard task of deciding the remaining cases.

In most instances, an explicit choice among these approaches is not necessary, for they all converge toward a single result, as I believe they would have in our hypothetical case involving the indexation of basis under a regulatory definition of the word "cost" in I.R.C. section 1012. Litigation may result both because the approaches do not converge and because there are such strongly held views on both sides regarding the proper approach to the language at issue that both sides are willing to commit significant economic resources to pursue their respective perspectives. Under those circumstances, perhaps the wise and pragmatic judge realizes that the job he or she must perform should not ignore the context that caused such strongly held views. The "proper" approach to the language at issue in that case may in fact be a hard-core textualist one in the sense that Justice Scalia uses it. Then again, it may not be. And perhaps that may not be indefensible.

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mental problems." The rule of express legislative action should not be over-extended, since a wholesale application of the rule could effectively hamstring legislatures. Legislatures must necessarily deal in generalities in this complex society, delegating many decisions to administrative agencies. Nevertheless, courts are becoming much more chary of the unfettered exercise of power by administrators, especially when they are making major policy decisions not clearly delegated by the legislature. Courts have thus balanced the interests involved, applying the rule of express legislative action in certain areas of major importance. Implicit in this process is the recognition that certain questions are best answered by legislators rather than courts or administrators.

Wilkinson & Volkman, *supra* note 60, at 654-55 (footnotes omitted). Wise words.

168. Again we can look to the field of Indian Law here as an example. It is a particularly rich field for use of this method because many statutes were enacted in eras in which termination of tribal life coupled with assimilation into the dominant political, legal, and social culture animated federal Indian policy. Using dynamic statutory interpretation, courts resolving interpretive disputes under these statutes can discount the legislative history of the enacting Congress and, if the language permits, interpret the language at issue in light of the current federal Indian policy of self-determination, which lies on the opposite end of the spectrum from assimilation. See *supra* note 32 (describing the *Yakima Tribe* tax case).

